SUPREME COURT, U.S.
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No. 99-

IN THE

Supreme Court of the United States

GIAO NGUYEN,

Petitioner,

v.

INOVA ALEXANDRIA HOSPITAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When there is no dispute about the date on which complainant actually received her "right to sue" letter from the EEOC, does the 90-day period in which she may file suit under Title VII commence: a) on the date of receipt, as the EEOC and many circuits hold, or b) as the Fourth Circuit held in this case, three days following the issuance date of the EEOC letter.

2. Whether a neighbor, collecting mail for a charging party during a one-week vacation, qualifies as an agent of the charging party for purposes of commencement of the 90-day right to sue period, or whether the imputation of receipt should be limited to counsel and those living in the same household.

3. Whether equitable tolling principles should apply when improper EEOC advice contributes to a belated filing of a Title VII suit, and where the complainant has taken all reasonable steps to ensure the suit is filed in a timely manner.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
A. Legal Context	2
B. Facts	3
C. The Proceedings Below	6
Reasons For Granting The Writ	10
1. There is a clear split among the United States Courts of Appeals regarding whether "actual notice" -- or some other events -- trigger the 90-day statute of limitations for commencement of a Title VII action.	12
2. The split between the Fourth Circuit and other Circuit Courts concerning	

who can be charged with Notice of the 90-day right to sue period on behalf of the charging party must be resolved. 22

3. The division among the Circuit Courts concerning the principles of equitable tolling applicable to Title VII statutes of limitations cases must be resolved in order to ensure a fair and consistent nation-wide application of the 90-day right to sue period. 25

Conclusion 28

Appendix A – Opinion of The United States Court of Appeals for the Fourth Circuit Filed July 30, 1999 ..... 1a

Appendix B – Order and Memorandum Opinion of the United States District Court for the Eastern District Of Virginia Filed June 19, 1998 ..... 12a

Appendix C – Order of the United States District Court for the Eastern District Of Virginia Filed July 17, 1998 ..... 19a

Appendix D – Order of The United States Court of Appeals for the Fourth Circuit Filed August 24, 1999 ..... 21a

TABLE OF AUTHORITIES

FEDERAL CASES

Anderson v. UNISYS Corp., 47 F.3d 302 (8th Cir. 1995)..... 27

Archie v. Chicago Truck Drivers, 585 F.2d 210 (7th Cir. 1978) 22

Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) 26

Banks v. Rockwell Int'l N. Am. Aircraft Operations, 855 F.2d 324 (6th Cir. 1988) 20

Bell v. Brown, 557 F.2d 849 (D.C. Cir. 1977)..... 15, 16

Brown v. Hartshorne Public School Dist. No. 1, 926 F.2d 959 (10th Cir. 1991) 19

Brown v. Hyperion Seating Corporation, 1999 WL 801591 (6th Cir. 1999) (unpublished opinion)..... 20

Bunch v. Bullard, 795 F.2d 384 (5th Cir. 1986)..... 14

Chappell v. EMCO Machine Works Co., 601 F.2d 1295 (5th Cir. 1979) 27

Comrie v. Bronx Lebanon Hosp., 133 F.3d 906, 1998 WL 29643 (2nd Cir. 1998) (unpublished opinion).... 16

Cook v. Providence Hosp., 820 F.2d 176, 179 n. 3 (6th Cir. 1987) 20

Craig v. Dept. of HEW, 581 F.2d 189 (8th Cir. 1978)..... 22

Espinoza v. Missouri Pacific R. Co., 754 F.2d 1247 (5th Cir. 1985) 14, 22

Franks v. Bowman Trans. Co., 580 F.2d 191 (5th Cir. 1978) 14, 22

Giao Nguyen v. Inova Alexandria Hospital, 187 F.3d 630, 1999 WL 556446 (4th Cir. 1999) (unpublished opinion) 1

Gordon v. National Youth Work Alliance, 675 F.2d 356 (D.C. Cir. 1982) 15

Harvey v. City of New Bern Police Dept., 813 F.2d 652 (4th Cir. 1987) 25

Hernandez v. Hill Country, 849 F.2d 139 (5th Cir. 1988) 14

Hornsby v. USPS, 787 F.2d 87 (3rd Cir. 1986) 18

Houston v. Sidley & Austin, 185 F.3d 837 (7th Cir. 1999) 19

Hunter v. Stephenson Roofing, Inc., 790 F.2d 472 (6th Cir. 1986) 20

Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990) 12, 26

Jackson v. Continental Cargo, 183 F.3d 1186 (10th Cir. 1999) 19

Johnson v. Al Tech Specialties Corp., 731 F.2d 143 (2nd Cir. 1984) 27

Josiah-Faeduwor v. Communications Satellite Corp., 785 F.2d 344 (D.C. Cir. 1986) 22

Law v. Hercules, 713 F.2d 691 (11th Cir. 1983) 23

Lewis v. Conners Steel Co., 673 F.2d 1240 (11th Cir. 1982) 15

Mosel v. Hills Dept. Store, Inc., 789 F.2d 251 (3rd Cir. 1986) 18, 22

Nelmida v. Shelly Eurocars, 112 F.3d 380 (9th Cir. 1996) 20

Plunkett v. Roadway Express, Inc., 504 F.2d 417 (10th Cir. 1974) 19

Saxton v. American Tel. & Tel. Co., 10 F.3d 526 (7th Cir. 1993) 19

Scholar v. Pacific Bell, 963 F.2d 264 (9th Cir. 1992) 20

Seitzinger v. Reading Hosp. and Medical Ctr., 165 F.3d 236 (3rd Cir. 1999) 18

Sherlock v. Montefiore Medical Ctr., 84 F.3d 522 (2nd Cir. 1996) 16, 17

Simpkins v. Washington Metropolitan Area Transit Authority, 132 F.3d 1482, 1997 WL 702349 (D.C. Cir. 1997) (unpublished opinion) 27

Sousa v. NLRB, 817 F.2d 10 (2nd Cir. 1988) 16, 17

St. Louis v. Alverno College, 744 F.2d 1314 (7th Cir. 1984) 19, 22

Tadros v. Coleman, 717 F.Supp. 996 (S.D.N.Y. 1989), *aff'd*, 898 F.2d 10 (2nd Cir. 1990), *cert. denied*, 498 U.S. 869 (1990) 16

Thomas v. KATV Channel 7, 692 F.2d 548 (8th Cir. 1982) ... 22

Udall v. Tallman, 380 U.S. 1 (1965) 12

University of Pennsylvania v. EEOC, 493 U.S. 182 (1990) 9, 10

Wagher v. Guy's Foods, Inc., 765 F.Supp. 667 (D. Kan. 1991) 27

Watts-Means v. Prince George's Family Crisis Center, 7 F.3d 40 (4th Cir. 1993) 6, 20, 25

Williams v. Enterprise Leasing Co. of Norfolk/Richmond, 911 F. Supp. 988 (E.D. Va. 1995) 6, 9

Williams v. Southern U. Gas. Co., 529 F.2d 483 (10th Cir. 1976), *cert. denied*, 429 U.S. 959 (1976) 19

Wilson v. National Car Rental System, Inc., 94 F.3d 646, 1996 WL 452882 (6th Cir. 1996) (unpublished opinion) 21

Zillyette v. Capital One Financial Corp., 179 F.3d 1337 (11th Cir. 1999) 15

Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982) 12, 27

FEDERAL STATUTES

28 U.S.C. § 1254(1) 1

29 U.S.C. §621 21

29 U.S.C. §626e 21

42 U.S.C. §2000e 2, 6, 12

42 U.S.C. §2000e-5(f)(1) 1, 12, 16, 24

Americans with Disabilities Act of 1990, 42 U.S.C. §12101 21

Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 2

Fed. R. Civ. P. 6(e) ..... *passim*

FEDERAL REGULATIONS

Regulations of the Equal Employment Opportunity Commission, 29 C.F.R. Part 1601.28(e)(1) 2, 12

Petitioner Giao Nguyen respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is an unpublished opinion, *Giao Nguyen v. Inova Alexandria Hospital*, 187 F.3d 630, 1999 WL 556446 (4th Cir. 1999) (Table, Text in Westlaw) (B). The opinion of the district court for the Eastern District of Virginia captioned *Giao Nguyen v. Inova Alexandria Hospital*, Civ. No. 97-1935-A is an unpublished memorandum opinion (App. B) as is the district court's order denying Ms. Nguyen's Motion to Alter or Amend the court's Order (App. C).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit ("Court of Appeals") was entered on July 30, 1999. The Court of Appeals denied a timely petition for rehearing or rehearing en banc on August 24, 1999 (App. B).

The jurisdiction of this Court to review the judgment of the Court of Appeals is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-5(f)(1), provides that "the Commission . . . shall . . . notify [the complainant of the dismissal] and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge."

Regulations of the Equal Employment Opportunity Commission, 29 C.F.R. Part 1601.28(e)(1), provide in relevant part that notice of right to sue shall include "[a]uthorization to the aggrieved person to bring a civil action under Title VII . . . within 90 days from receipt of such authorization."

Federal Rule of Civil Procedure 6(e) provides:

> (e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

STATEMENT OF THE CASE

A. Legal Context

Congress established an administrative process by which aggrieved individuals initiate claims for relief under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e et seq., from unlawful discrimination. The Act requires that a charge of discrimination first be brought to the Equal Employment Opportunity Commission within 180 days of the alleged discriminatory act. Id. at §2000e-(5)(e). If the Commission dismisses the charge or issues a right to sue letter, the complainant may bring a civil action in court within 90 days "of the giving of such notice" of dismissal or of right to sue. Id. at §2000e-5(f)(1).

B. Facts

The facts as provided by the Court of Appeals are adequate for purposes of this appeal. (App. A). Ms. Nguyen worked as a registered nurse at INOVA Alexandria Hospital, primarily in the intensive care unit, from 1981 until her termination on June 18, 1996. Ms. Nguyen raised an internal complaint of discrimination which was amended to include retaliation upon her termination. Ms. Nguyen timely lodged her complaint with the Alexandria Human Rights Commission, which referred it for processing to the Equal Employment Opportunity Commission ("EEOC").

Upon dismissal of Ms. Nguyen's EEOC charge, the EEOC mailed Ms. Nguyen a Notice of Dismissal and a letter notifying her of the right to sue. The letter notifying her of the right to sue was dated August 20, 1997, and the letter, along with the Notice of Dismissal, were mailed together by regular (not certified) U.S. mail to Ms. Nguyen's correct home address of record.

On August 22, 1997, Ms. Nguyen and her family left for a family vacation at the seashore before school resumed, and returned on September 1, 1997. The Nguyens asked their next door neighbors, Kurt and Kathy Thompson, to collect their mail from their mailbox during their vacation. The neighbors did so as they had in the past.

On September 1, 1997, Labor Day, upon returning from the shore, Ms. Nguyen's husband retrieved the pile of mail from their neighbors. On September 2, 1997, Ms. Nguyen opened the mail, finding the EEOC letter providing the right to sue and the Notice of Dismissal.

The EEOC right to sue letter opened by Ms. Nguyen on September 2, 1997, states:

> The Director has decided to dismiss your charge and issue you a notice of right to sue. The enclosed document entitled "Dismissal and Notice of Rights" explains that, should you wish to pursue the matter in court, suit must be filed within 90 days ***of your receipt of this letter***.

(emphasis added). The attached Dismissal and Notice of Rights stated:

> Notice of Suit Rights
>
> Title VII, the Americans with Disabilities Act, and/or the Age Discrimination in Employment Act: This will be the only notice of dismissal and of your right to sue that we will send you. You may pursue this matter further by bringing suit in federal or state court against the respondent(s) named in the charge. **If you decide to sue, you must sue <u>WITHIN 90 DAYS</u> from your receipt of this Notice.** Otherwise, your right to sue based on the above-numbered charge will be lost.

(emphasis in original).

On September 9, 1997, Ms. Nguyen telephoned counsel to make an appointment for a legal consultation. An appointment was made for September 19 and Ms. Nguyen was required to bring a copy of her EEOC file. Also on September 9, 1997, Ms. Nguyen made a request to the EEOC for a copy of

her file, which request she confirmed in writing. Ms. Nguyen made several follow-up calls and personal visits to the EEOC in an attempt to obtain her file to no avail. Counsel rescheduled the legal consultation to September 26 due to the non-receipt of the file. After additional calls and visits, the EEOC finally copied the file for Ms. Nguyen when she demanded it on the morning of September 26 in order for her to keep her appointment with counsel.

Upon reviewing the file on September 26, counsel asked Ms. Nguyen to provide additional information. During the next month, Ms. Nguyen met with a doctor with whom she had worked and obtained from him a written statement supporting her version of key events related to her harassment and discharge claim. Ms. Nguyen also telephoned the EEOC and asked when her 90-day right to sue period began. An EEOC case worker and a supervisor both told Ms. Nguyen that her right to sue period began the date she received the notice, but that she would have to prove when she received it. On November 7, 1997, counsel met with Ms. Nguyen and reviewed the new evidence and, for the first time, a representation agreement was entered into for the sole purpose of attempting settlement.

On November 20, 1997, counsel sent by hand-delivery a settlement demand letter to counsel for the hospital; the letter indicated December 1, 1999, was the deadline to file suit. On November 26, 1997, defense counsel substantively responded and rejected settlement overtures. Ms. Nguyen filed suit *pro se* on November 28, 1997, and defense counsel thereafter successfully claimed that the deadline for filing suit expired on November 21, 1997, on the basis that Ms. Nguyen was charged with receipt of the notice of right to sue 3 days after the date on the letter, *i.e.* when it was presumptively delivered to her

mailbox during her absence, instead of upon her receipt of the same.

Not in dispute are the facts that Mr. Nguyen received the EEOC envelope from her neighbors on September 1, 1997, Labor Day, and Ms. Nguyen received it and actual notice on September 2, 1997. Ms. Nguyen's claim would not have been dismissed had the undisputed date of her receipt (or her husband's receipt) been used to determine when the 90-day right to sue period commenced. It is also clear that had Ms. Nguyen requested the post office to hold her mail, the notice could not have been actually provided to the Nguyen household earlier than September 2, as September 1 was a Federal holiday.

C. Proceedings Below

Jurisdiction in the district court was premised upon Ms. Nguyen's amended complaint alleging violations of Title VII of the Civil Rights of 1964, as amended, 42 U.S.C. §2000e et seq. After full discovery, the district court granted defendant's motion for summary judgment on the grounds that Ms. Nguyen did not file suit within 90 days of receiving notice of the right to sue. (App. B). The district court stated that "the 90 day limitations period is triggered not by the actual receipt by the plaintiff of the EEOC letter, but rather by the U.S. Postal Service's delivery of the letter, thus making it available to plaintiff." (App. B at 5, *citing* Watts-Means v. Prince George's Family Crisis Center, 7 F.3d 40 (4th Cir. 1993) and Williams v. Enterprise Leasing Co. of Norfolk/Richmond, 911 F. Supp. 988 (E.D. Va. 1995)). The district court found that the fact that the delivery date to Ms. Nguyen's mailbox during her vacation is unknown does not create a genuine issue of fact "for the law mandates a 3-day delivery period." App. B at 6. Therefore, the

district court concluded that the 90-day right to sue period began when the August 20, 1997, letter was presumptively delivered to Ms. Nguyen's mailbox on August 23, 1997, and that the period expired on November 21, 1997, seven days before the action was filed. (App. B at 7). The court also found equitable tolling inapplicable.

Upon Ms. Nguyen's timely motion to alter or amend the order granting summary judgment, the district court denied the motion. (App. C). The district court denied relief stating: "**That other Circuits may follow different rules in ascertaining the date on which the 90-day limitations period begins running does not change the fact that the law in this Circuit is clear and settled, even if different from other circuits.**" (App. C at 2) (emphasis added). The district court had before it a sworn affidavit from the neighbors and Ms. Nguyen establishing the time and details of the vacation, the informal agreement to pick-up mail and hold it, and Mr. Nguyen's receipt of the mail bundle on September 1, 1997, and Ms. Nguyen's receipt of the notice on September 2, 1997. [1]

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[1] The district court and court of appeals found it significant that Ms. Nguyen did not provide during discovery a copy of the envelope in which the letter was mailed. (At deposition, Ms. Nguyen stated that she possessed the envelope.) The courts held that the missing postmark on the envelope created a factual dispute requiring the application of the three-day mail delivery rule found in Rule 6(e) of the Federal Civil Rules of Procedure. (App. B at 6-7; App. C at 6, n. 3.)

The fact that Ms. Nguyen could not produce the envelope has absolutely no factual or legal bearing on this matter. The envelope may as well have been delivered to Ms. Nguyen's mailbox and empty home on August 22 as August 23, 1997. Ms. Nguyen still would not have received it until September 1 or 2, 1997. Moreover, the postmark is incapable of proving when it was delivered to Ms. Nguyen's mailbox. Its production could only serve to assist Ms. Nguyen by establishing that the postmark was later than the date of the letter, leading to a later deadline for filing. Thus, its non-production certainly carries no inference that she withheld meaningful

Upon timely notice of appeal, the Court of Appeals for the Fourth Circuit affirmed, *per curiam*, in an unpublished opinion. (App. A). Ms. Nguyen pointed out that her filing would be timely under an "actual receipt" rule. See Appellant's Fourth Circuit Br. at 9-11, in passim. The Court of Appeals stated that "we have rejected an 'actual receipt' rule" and maintained that the Circuit engages in "a case-by-case examination to determine if equitable tolling of the filing period is appropriate." (App. A at 5). Although there was no dispute about the day on which Ms. Nguyen received the letter, the Fourth Circuit decided that the 90-day limitations period commenced when the EEOC's right to sue letter was delivered to Ms. Nguyen's home and picked up by a designated neighbor. (App. A at 6). The court determined that "Nguyen's neighbors were acting as Nguyen's **agent** and were the **intended recipient** of the EEOC letter." (App. A at 8) (emphasis added). The court cited no legal authority and no part of the record to support its finding of a legally cognizable agency relationship between Ms. Nguyen and her neighbors.

The court declined to apply equitable tolling. The court was unpersuaded that Ms. Nguyen's actions in safeguarding her mail during her absence, the delay of EEOC in copying her file, gathering evidence to support her case and meeting with counsel during her 90-day period, attempting settlement prior

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evidence, as defendant's have implied. Nor does its non-production put into question anything which was not already in question – the date Ms. Nguyen received the notice. The envelope is not evidence of receipt. The affidavits submitted by Ms. Nguyen and her neighbors clearly establish when people received the notice. Furthermore, the dispute presented here is not over the presumed date that the letter was postmarked, but over whether the 90 days began to run when it arrived in Ms. Nguyen's mailbox or when she actually received it.

to filing suit, and, most important to Ms. Nguyen, her prejudicial reliance on erroneous advice from the EEOC (including a supervisor) that her 90 days commenced upon her receipt on September 2, 1997, were sufficient to toll the filing period. (App. A at 7-8).

The EEOC participated by brief and at oral argument as an Amicus Curiae in support of Ms. Nguyen. (See EEOC Amicus Brief ("Am. Br.")). The EEOC explained that the Title VII language is inconsistent with the holding that the 90-day limitations period commences when the EEOC notice is delivered to complainant's mailbox. (Am. Br. at 1). Participation by the EEOC was important because the resolution of the issue will have a significant impact on numerous Title VII litigants. (Am. Br. at 2). The EEOC maintains that the EEOC regulations, as embodied in its Notice of Dismissal and Notice of Right to Sue, correctly interpret the statutory language as requiring a 90-day period to be triggered by Ms. Nguyen's receipt, not by mere presumptive delivery to her mailbox or her neighbors. (Am. Br. in passim).

Like Ms. Nguyen, the EEOC found incredible the argument that delivery to Ms. Nguyen's mailbox during her vacation constituted good notice even where Ms. Nguyen proved when she had actually received the letter. Id. Recognizing that Courts at times apply the doctrine of constructive receipt where the plaintiff delays receipt, the EEOC determined that Ms. Nguyen did everything the EEOC or the law could have expected of her to receive her mail in a timely fashion. Id. at 11. Ms. Nguyen, in the view of the EEOC, should not be required to inform her neighbors in this case about her pending discrimination charge as it would be inconsistent with Congress' concern for confidential charge processing. (Am. Br. at 11-12, citing University of

Pennsylvania v. EEOC, 493 U.S. 182, 192-93 (1990)). Notwithstanding the United States' position, the court rejected the EEOC's statutory interpretation and its legal and policy-based reasoning.

The Court of Appeals denied Ms. Nguyen's timely Petition for Rehearing and Rehearing En Banc by Order filed August 24, 1999. (App. B). It is from this Order that Ms. Nguyen respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

REASONS FOR GRANTING THE WRIT

The Civil Rights Act of 1964 applies in all jurisdictions with the same force and effect. Individual rights under the Act can be consistent throughout the nation only when both the substance and the process of the Act are applied consistently across the Courts of Appeals. The decision in this case, however, demonstrates that significant conflicts exist between the Courts of Appeals regarding the appropriate timing of the 90-day period that Congress gave Title VII claimants to file a lawsuit after they receive their "right to sue" letter from the EEOC. Allowing those conflicts to go unaddressed leaves Title VII complainants confused as to their responsibilities while generating unnecessary conflicts regarding what should be a straightforward application of statutory law. This Court should grant review to ensure that Title VII is applied consistently throughout the nation, giving all claimants the amount of time that Congress deemed necessary to bring a civil rights action.

The first conflict arises because the "delivery rule" applied by the Court of Appeals for the Fourth Circuit in this case (and

used by the Sixth Circuit) is at odds with the "actual receipt rule" applied by at least 5 Circuit Courts under similar facts. The D.C., Second, Third, Seventh, and Tenth Circuit Courts maintain that the 90-day right to sue period is triggered when the complainant (or sometimes a designated counsel or family member) *receives* the EEOC notice of the 90-day right to sue period, not when the EEOC envelope is presumptively delivered to one's mailbox. The division among the circuits reflects different interpretations of both Title VII statutory language and an EEOC regulation. This Court should grant certiorari to resolve that conflict, and explain what triggers the running of the 90-day statute of limitations.

After this case, the Courts of Appeals also disagree about a related question that arises when someone other than the claimant received the EEOC letter. The Courts of Appeals disagree about the relationship necessary between claimant and the recipient to impute "notice" to the claimant upon the other party's receipt of the letter. In this case, despite Ms. Nguyen's and the EEOC's arguments to the contrary, the Fourth Circuit deemed a friendly neighbor as an "agent" and "the intended recipient" of the right to sue letter. Nothing is further from Ms. Nguyen's actual intent and the neighbor's actual authority in this case. Aside from the error of fact and law in this case, the decision generates a division in the circuits regarding who is capable of being charged with receipt of EEOC's notice of right to sue. Review by this Court is therefore warranted.

Finally, the Fourth Circuit's decision generates a division in the circuits regarding when equitable tolling should be applied even if a suit if filed late. In circumstances like this one -- where the claimant took all reasonable steps to ensure timely receipt, and where the belated filing was based, in part, on erroneous advice from the EEOC, other courts have applied

equitable tolling. The Fourth Circuit's failure to do so in this case reflects an improper application of equitable tolling that should be reviewed by this Court.

1. There is a clear split among the United States Courts of Appeals regarding whether "actual notice" -- or some other events -- trigger the 90-day statute of limitations for commencement of a Title VII action.

This Court has held that the 90-day time period within which to bring suit under the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., is akin to a statute a limitations, subject to equitable tolling, and is not jurisdictional. Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982); Irwin v. Department of Veterans Affairs, 498 U.S. 89 (1990). The statutory language at issue is the same here as it was in Zipes: It provides that "the Commission . . . shall . . . notify [the complainant of the dismissal] and within ninety days after the *giving of such notice* a civil action may be brought against the respondent named in the charge." 42 U.S.C. §2000e-5(f)(1) (emphasis added). Thus, Congress set a 90-day period between one's "notice" of dismissal of EEOC charges and the last day to file a civil action.

The Commission, or EEOC, has promulgated regulations to carry out Congress' mandate to investigate and process claims of discrimination. The EEOC's regulations governing the private sector provide that notice of the right to sue shall include "[a]uthorization to the aggrieved person to bring a civil action under Title VII . . . within 90 days *from receipt* of such authorization." 29 C.F.R. Part 1601.28(e)(1) (emphasis added). The EEOC's interpretation of a statute it enforces is entitled to deference. Udall v. Tallman, 380 U.S. 1, 16 (1965).

The EEOC reasonably interprets the statute to give complainants 90 days to file their suit beginning when the complainants are informed, or "authorized" that they may do so. Ms. Nguyen's Notice of Dismissal and Rights provides that **"If you decide to sue, you must sue WITHIN 90 DAYS from your receipt of this Notice."** (emphasis in original) (App. A at 3 (without original emphasis); EEOC Am. Br. at 6-7). Therefore, in the view of the EEOC, the clock starts "ticking" upon the complainant's *receipt* of the notice. The EEOC view comports with the reasonable interpretation that the 90 days belongs to the complainant and is not meant to be shared with the EEOC or the U.S. Postal Service.

In this case, the Fourth Circuit refused to accept the EEOC's interpretation by holding that even if the complainant can prove when she first received the right to sue letter, the Circuit will begin the 90-day right to sue period three days after the date the letter issued. (App. A at 6). The Court of Appeals reasoned that the letter arrived at the charging party's mailbox three days after the date it was presumptively sent by the EEOC. The court added three days to the letter's date by invoking Rule 6(e) of the Federal Rules of Civil Procedure, which provides: [2]

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[2]The reliance upon Rule 6(e) stems from this Court's presumption in Baldwin County Welcome Center v. Brown, 466 U.S. 147, 150 n. 4, 104 S.Ct. 1723, 1725 n. 4 (1984) (per curium), that a district court received a Title VII complaint within 3 days of its mailing. At issue in Baldwin, however, was whether the filing of a right to sue letter constituted a sufficient complaint to commence a suit. Id. Moreover, the three-day presumption in Rule 6(e) is not a general rule for receipt of an EEOC notice by a complainant, but receipt of a complaint by a court, as the rule was intended to operate. Id. The Federal Rules of Civil Procedure are not generally applied to an administrative notice given before a person has invoked the judicial system to resolve her complaint.

> (e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

According to the Fourth Circuit, therefore, *delivery* to the charging party's *mailbox* is the key. Under this "delivery rule," there is essentially a 93-day period within which to file suit using the date stamped on the EEOC letter. Following this decision, litigants in the Fourth Circuit must file suit within 93 days of the date on the letter, not as the EEOC right to sue letter expressly notifies them, within 90 days of their receipt of the letter.

This is not the law in other circuits. Contrary to the Fourth Circuit's view, the holdings of the D.C., Second, Third, Seventh, and Tenth Circuit Courts stand for the "receipt rule" and disavow the "delivery rule."[3] The D.C. Circuit Court has

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[3]The Fifth Circuit has seemingly made it clear that, once again since Franks v. Bowman Trans. Co., 580 F.2d 191 (5th Cir. 1978), it will not deem notice given until the complainant-addressee has actually received it. "We have held repeatedly that when the right to sue letter is addressed to the claimant, the 90 day period begins to accrue when the claimant receives the notice." Hernandez v. Hill Country, 849 F.2d 139 (5th Cir. 1988), citing Bunch v. Bullard, 795 F.2d 384 (5th Cir. 1986). Compare Espinoza v. Missouri Pacific R. Co., 754 F.2d 1247, 1249 (5th Cir. 1985) (holding that ordinarily, the 90-day right to sue will commence "on the date that notice is received at the address supplied to the EEOC by the claimant" and that tolling, not an actual receipt rule, will be used to save notices which are not actually received by complainants through no fault of their own).

indicated that it follows an actual receipt rule under similar facts to the instant case, demonstrating a firm basis for a split with the Fourth Circuit rule. In Bell v. Brown, 557 F.2d 849 (D.C. Cir. 1977), a Federal employee was subject to a 30-day period for filing suit under Title VII. The notice of his right to sue was dated August 27, 1974. Id. at 851. The notice was sent to his designated but former counsel by registered mail, which was held to be ineffective. Id. The notice to the complainant was sent by regular mail. Id. at 852. The Court held that "*[w]e do now know, and likely no one could be certain, as to when it was delivered. In any event, appellant did not see it until September 3, when he returned from a* vacation *begun on August 30.*" Id. (emphasis added). The D.C. Circuit held that the suit-filing period did not begin to run until Bell actually received the notice. Id. at 857.

The date of actual receipt controlled, and it was a simple determination made based upon Bell's affidavit. Id. at 852, n. 15. As should be the case here, the unknown date of delivery to Bell's apparently empty home did not sway the court from an actual receipt rule. See also Gordon v. National Youth Work Alliance, 675 F.2d 356, 363-64 (D.C. Cir. 1982) (holding under Title VII that where the "crucial fact" of the date of actual receipt is in dispute, an evidentiary hearing should be held prior to a trial on the merits) citing Bell v. Brown, supra,

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The Eleventh Circuit abides in general with the actual receipt rule as in Sousa, infra, in the Second Circuit. See Lewis v. Conners Steel Co., 673 F.2d 1240 (11th Cir. 1982); Franks v. Bowman Trans. Co., supra; Law v. Hercules, Inc., 713 F.2d 691 (11th Cir. 1983). The Eleventh Circuit recognizes that "when a plaintiff has not known of the receipt of the letter through no fault of his own or because of circumstances beyond his or her control, as in Franks, the time must begin to run from the time of actual receipt. Zillyette v. Capital One Financial Corp., 179 F.3d 1337 (11th Cir. 1999).

and other cases. Thus, the D.C. Circuit is inclined to recognize actual receipt as the controlling factor in Title VII cases on facts similar to this case.

The Second Circuit holds the view that, in accordance with 42 U.S.C. §2000e-5(f)(1), a Title VII action must be commenced within ninety days of the receipt of an EEOC right-to-sue letter. Sherlock v. Montefiore Medical Ctr., 84 F.3d 522 (2nd Cir. 1996); Sousa v. NLRB, 817 F.2d 10 (2nd Cir. 1988). The Second Circuit applies Rule 6(e) only if there is no admissible evidence on the date of actual receipt.[4] Id. That was not the case here. See also Comrie v. Bronx Lebanon Hosp., 133 F.3d 906, 1998 WL 29643 (2nd Cir. 1998) (unpublished opinion) (affidavit submitted by plaintiff stating her date of actual receipt successfully rebutted a three day presumption). In this case, the evidence demonstrates that Ms. Nguyen's husband retrieved the mail from the neighbors on September 1 and that she opened it on September 2, 1997.

The case of Sousa v. NLRB, 817 F.2d 10 (2nd Cir. 1987), involved facts similar to this case, but also led to a different result. In Sousa, the right to sue letter, which was a notice of a final agency decision involving a Federal employer, was dated August 16, 1985. The letter was sent by certified mail. The certified letter was received at the post office on August 31, 1985. A notice was placed in Sousa's post office box on

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[4] The Second Circuit is also willing to apply a five day presumption of receipt if the date of actual receipt cannot be substantiated. See, e.g., Tadros v. Coleman, 717 F.Supp. 996, 1008 (S.D.N.Y. 1989), aff'd, 898 F.2d 10 (2nd Cir. 1990), cert. denied, 498 U.S. 869 (1990). Likewise, the Sixth Circuit has applied a five day presumption of receipt when actual receipt could not be proved. Cook v. Providence Hospital, 820 F.2d 176, 179 n. 3 (6th Cir. 1987); Hunter v. Stephenson Roofing, Inc., 790 F. 2d 472 (6th Cir. 1986).

September 5, 1985. Sousa took the certified mail notice to the counter and retrieved his EEOC letter on September 10, 1985. The Second Circuit held that September 10, 1985, the date of his actual receipt of the letter, is the effective date for measuring the 30-day period (then applicable to Federal employees). The court also stated that a 5-day delay in picking up Sousa's mail was not an unreasonable delay. Thus, the Second Circuit will not as a matter of law charge a complainant with receipt prior to his actual receipt even if the EEOC letter (or certified notice of it) arrived at his mailbox and effectively sat there for some number of days.

The case of Sherlock v. Montefiore Medical Ctr., supra, illustrates the split between the circuits on the actual receipt rule. The plaintiff in Sherlock filed her complaint 99 days after the *date* of the right to sue notice. Id. at 525. The plaintiff did not precisely recollect when she received the right to sue letter and could offer no admissible evidence on the point. Id. at 526. The defendant, however, received the letter at least 12 days after its typewritten date. Id. The late receipt by the defendant was enough to raise a question of fact as to whether Sherlock had received it within three days of the date stamped on the letter. Id. The Second Circuit reversed the district court and reinstated her complaint. Id. The important issue in the view of the Second Circuit was the date on which the plaintiff actually received it. The existence of admissible evidence on that point rebutted the presumption of receipt three days after mailing.

The Third Circuit also follows an actual receipt rule: where the actual receipt date is known, that date controls the determination of when the 90-day period is triggered. Mosel v. Hills Dept. Store, Inc., 789 F.2d 251 (3rd Cir. 1986); Hornsby v. USPS, 787 F.2d 87 (3rd Cir. 1986). See also Seitzinger v.

Reading Hosp. and Medical Ctr., 165 F.3d 236 (3rd Cir. 1999) (decided on equitable tolling grounds). In Mosel, the court reviewed the statutory language and concluded that "the time for filing a complaint begins to run when the plaintiff has notice of the EEOC Charge; this usually occurs on the date he receives a right to sue letter." Mosel, 789 F.2d at 252 (citations omitted). The court also recognized that "indeed" the EEOC letter specifically informs plaintiffs that the 90-day period does not begin to run until after they receive it. Id. The court explained why it did not apply Rule 6(e): because its purpose is to provide additional time when a time period is measured from the date mailed; whereas under the actual receipt rule, the 90-day period begins only *after* one receives the letter. Id. at 253 (also recognizing this Court's suggestion in Baldwin related to Rule 6(e)).

In Hornsby, supra, the Third Circuit made a clear statement that the mere delivery of an unmarked notice for pick-up of a certified letter (Form 3849), without indication as to who it was from or of any other relevant information, was, as a matter of law, legally insufficient to constitute "notice" to the addressee of one's 90-day right to sue period. Hornsby, 787 F.2d at 92. The facts in the instant case present a similar situation. Ms. Nguyen had no idea that the EEOC issued any letter, nor any reason to suspect that a dismissal letter would be issued at that time, prior to or during her vacation. Reasonably enough, the neighbors were not charged with calling Ms. Nguyen to discuss incoming mail or to open her mail and take action on it. Thus, the earliest date possible when Ms. Nguyen was in a position to be aware of her rights was September 1, 1997. Contrary to the Fourth Circuit, the Third Circuit would not have found a basis to charge Ms. Nguyen with knowledge of her rights prior to September 1 or 2, 1997.

The Seventh Circuit also follows the actual receipt rule. Recently faced with a case presenting receipt questions, the court made it clear that "the 90 day period begins to run when the claimant receives actual notice of her right to sue." Houston v. Sidley & Austin, 185 F.3d 837 (7th Cir. 1999), citing Saxton v. American Tel. & Tel. Co., 10 F.3d 526, 532 n. 11 (7th Cir. 1993) (other citations omitted). The actual receipt rule will not be applied, however, to plaintiffs who fail to receive actual notice through their own fault. Id. at 839; see St. Louis v. Alverno College, 744 F.2d 1314 (7th Cir. 1984) (complainant failed to notify EEOC of his new address). If the notice is sent by certified mail, the Seventh Circuit charges the plaintiff with notice on the day plaintiff actually received the letter as long as the letter is picked up before the Post Office's deadline to return it to the sender. Id.

The Tenth Circuit likewise has a general rule that the 90-day period for filing suit under title VII commences on the date that the complainant actually receives the right-to-sue letter from the EEOC. Williams v. Southern U. Gas. Co., 529 F.2d 483, 487 (10th Cir. 1976), cert. denied, 429 U.S. 959 (1976); Plunkett v. Roadway Express, Inc., 504 F.2d 417, 418-19 (10th Cir. 1974); Brown v. Hartshorne Public School Dist. No. 1, 926 F.2d 959, 961 (10th Cir. 1991). Recently, the Tenth Circuit reviewed the rationale and held, once again, that "we are persuaded that starting the limitation period upon actual receipt of the right-to-sue letter is the view most in keeping with the language and purpose of the statute. Jackson v. Continental Cargo, 183 F.3d 1186, 1189 (10th Cir. 1999).

The Fourth Circuit opinion in this case adopts a delivery rule: assuming 3 days for delivery unless proved otherwise, complainants have 93 days from the date stamped on the

EEOC's 90-day right to sue letter within which to file suit.[5] Although that is not what the statute or regulation provides, the Sixth Circuit also follows a "delivery rule."[6] The Sixth Circuit has held that "the actual receipt of a right-to-sue letter by the charging party is not required to start the 90-day limitations period." Brown v. Hyperion Seating Corporation, 1999 WL 801591 (6th Cir. 1999) (unpublished opinion), citing Banks v. Rockwell Int'l N. Am. Aircraft Operations, 855 F.2d 324, 326 (6th Cir. 1988); Hunter v. Stephenson Roofing, Inc., 790 F.2d 472, 474-75 (6th Cir. 1986). According to the Sixth Circuit, "[a]s long as the right-to-sue letter is correctly mailed by the EEOC to the charging party's address of record, a presumption exists that the mail is received by the addressee and the 90-day limitations period begins to run five days after the date of mailing." Brown, supra, at 2. See also Cook v. Providence Hosp., 820 F.2d 176, 179 n. 3 (6th Cir. 1987) (emphasis added). But see Wilson v. National Car Rental System, Inc., 94 F.3d 646, 1996 WL 452882 (6th Cir. 1996) (unpublished opinion) (holding an age discrimination complaint timely filed

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[5] The Fourth Circuit has insisted that its rule in Harvey v. City of New Bern Police Dept., 813 F.2d 652, 654 (4th Cir. 1987) and Watts-Means v. Prince George's Family Crisis Center, 7 F.3d 40, 42 (4th Cir. 1993) rejected the actual receipt rule and adopted the "flexible" rule of the Fifth and Eleventh Circuits. But the Fourth Circuit goes further in its holding by embracing the delivery rule, while the Fifth and Eleventh Circuits tend to favor the actual receipt rule unless the complainant is at fault for not receiving timely actual notice. See case cited supra. This Court was not given an opportunity to review either Fourth Circuit case.

[6] The Ninth Circuit also appears to follow a "delivery rule." Scholar v. Pacific Bell, 963 F.2d 264 (9th Cir. 1992). The Ninth Circuit seems to conclude that the 90-day period begins running when *delivery* of a right to sue notice is *attempted* at the address of record. Nelmida v. Shelly Eurocars, 112 F.3d 380, 384 (9th Cir. 1996).

because it was filed 88 days after the EEOC notice was "actually received").[7]

The Fourth Circuit and Sixth Circuit, and seemingly the Ninth Circuit, clearly follow a delivery rule and disavow the actual receipt rule. The wide split between the Circuit Courts prevents complainants from understanding when a suit is timely. Perhaps more important, the differing approaches also depart from the EEOC's sound interpretation and uniform advice to all complainants in all circuits under Title VII as well as the ADEA that notice begins to run when actually received by the complainant. Review by this Court is needed to resolve the notice requirements and the obligations of the EEOC.

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[7] Complaints brought under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §621 et seq., which are received and processed by the EEOC like complaints arising under Title VII and the Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et seq., "may be brought . . . within 90 days after the date of the *receipt* of such [Commission] notice." 29 U.S.C. §626e (emphasis added). The statutory language of the ADEA is precisely how the EEOC interpreted the statutory language of Title VII, and the EEOC mandate to investigate and give notice to complainants of their right to sue is the same. Even the Sixth Circuit implicitly recognizes that an actual receipt rule would make cases come out differently in the course of applying the actual receipt rule to age claims. See, e.g., Wilson v. National Car Rental System, Inc., supra. The ADEA provision clearly supports Ms. Nguyen's and the EEOC's reading of the Title VII 90-day notice provision, an analogous statute hardly departing in Congressional intent when it comes to entitling a complainant to file a suit in federal court following dismissal by the EEOC. Practically, many complaints raise both Title VII and ADEA claims and are processed by the EEOC as if there is no distinction. The EEOC right to sue letter and the Notice of Dismissal and Rights provided to Ms. Nguyen apply on their faces to the ADEA as well as Title VII and the ADA -- a reasonable "one size fits all" approach given the perfunctory task at issue.

2. The split between the Fourth Circuit and other Circuit Courts concerning *who* can be charged with Notice of the 90-day right to sue period on behalf of the charging party must be resolved.

In this case, the Fourth Circuit converted Ms. Nguyen's neighbor into Ms. Nguyen's agent, for receipt of the EEOC notice, merely because the neighbor agreed to collect and hold Ms. Nguyen's mail while she was on vacation. This ruling highlights another important conflict between Circuits following the actual receipt rule and those, like the Fourth Circuit, that follow the delivery rule.

Of the Circuit Courts that endorse the actual receipt rule, there is near uniformity that a complainant can be charged with constructive receipt if a family member of responsible age and sound mind accepts the letter at the address designated by the complainant or if receipt is acknowledged by an attorney who the complainant designated to receive the notice. These two classes of people -- family members[8] and attorneys[9] -- are largely the only recognized classes of a putative agent of complainant.

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[8] See Espinoza v. Missouri Pacific R. Co., 754 F.2d 1247 (5th Cir. 1985) (wife); Law v. Hercules, 713 F.2d 691 (11th Cir. 1983) (son). Compare Franks v. Bowman Trans. Co., 580 F.2d 191 (5th Cir. 1978) (no notice where letter received and lost by 9-year old nephew); Archie v. Chicago Truck Drivers, 585 F.2d 210 (7th Cir. 1978) (no notice when wife received letter) with St. Louis v. Alverno College, 744 F.2d 1314 (7th Cir. 1983) (notice imputed if fault).

[9] See Josiah-Faeduwor v. Communications Satellite Corp., 785 F.2d 344 (D.C. Cir. 1986); Mosel v. Hills Dept. Store, Inc., 789 F.2d 251 (3rd Cir. 1986); Thomas v. KATV Channel 7, 692 F.2d 548 (8th Cir. 1982); Craig v. Dept. of HEW, 581 F.2d 189, 193 (8th Cir. 1978) (federal sector).

The theory of constructive notice is that the notice is as good as giving it to the complainant directly. It is also the predominant view that charging certain family members with receipt will protect against the possibility that they would help a complainant manipulate the commencement of the 90-day right to sue period. See, e.g., Law v. Hercules, 713 F.2d 691 (11th Cir. 1983). Moreover, it is presumed that both family members at the designated address and designated attorneys have ready access to the complainant to inform him or her of the EEOC letter and possibly have been privy to the ongoing EEOC charge process. See id. and cases cited supra, n. 8.

The Fourth Circuit in this case demonstrated an unprecedented willingness to create a new class of agents: neighbors. The relationship with neighbors rarely, if ever, rises to that same level of implicit trust as family, and, in the case of attorneys, legal or fiduciary responsibility. The casual relationship with neighbors is reflected by the facts of this case, in which there was no evidence that Ms. Nguyen's neighbor was designated to do anything more than bundle together and safekeep in their home mail from Ms. Nguyen's mailbox for a week-long period. Had the EEOC sent the letter by certified mail (as the EEOC formerly did), Ms. Nguyen's neighbor would have had no right to obtain the EEOC notice. Nevertheless, the Fourth Circuit held Ms. Nguyen accountable on the theory that she had -- without the neighbors' knowledge or consent -- formally designated them as her "agents" with serious legal consequences.

Recognizing the unacceptable results that flow from a decision like that reached by the Fourth Circuit, the EEOC argued strongly against such a ruling in both its *Amicus* Brief and at oral argument. See EEOC *Amicus* Brief. As the EEOC and Ms. Nguyen pointed out, Title VII's plain language

requires that the complainant have 90 days within which to file suit "*after* the giving of notice" by the Commission. 42 U.S.C. §2000e-5(f)(1). The EEOC reasonably understood this to mean that the aggrieved individual have the full benefit of 90 days, thus the 90 days begins to run upon receipt. The ruling in this case, however, demonstrates that "delivery rule" jurisdictions have essentially no criteria for determining who amounts to an "agent."

In this case, for instance, the Fourth Circuit would likely have arrived at the same conclusion if a teenager had been hired to bring the mail and paper in when she fed the fish every other day.[10] The Fourth Circuit's ruling, in combination with its "delivery rule," dangerously dilutes the meaning of the statute, is in conflict with other Circuits, and shows no deference to the EEOC regulation charging notice upon the complainant's receipt.

In order to prevent this division among the Circuit Courts from creating further confusion in Congress' straightforward directive that claimants should have 90 days in which to file suit after receiving their right-to-sue letter, this Court should grant review and reverse the ruling of the Fourth Circuit.

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[10] The extremely broad interpretation of who could amount to an "agent" under the delivery rule suggests that the question is actually a red herring. Because the 90-day period in the Fourth Circuit begins to run on the date of delivery, rather than on the date that the letter is actually received by the claimant, its ruling would be no different if Ms. Nguyen had allowed her mail to pile up in her mailbox, rather than acting responsibly and asking her neighbor to pick it up. Ultimately, the Fourth Circuit's broad holding regarding agency says more about its error on the merits of the "actual receipt" vs. "delivery" rule than it does about anything else.

3. The division among the Circuit Courts concerning the principles of equitable tolling applicable to Title VII statutes of limitations cases must be resolved in order to ensure a fair and consistent nation-wide application of the 90-day right to sue period.

Although the Fourth Circuit has ruled that it will apply the principles of equitable tolling to correct injustices by conducting a thorough examination of facts, it held in this case that equitable tolling was in appropriate, in part, because Ms. Nguyen had from 56 to 80 days left in the filing period. See Watts-Means v. Prince George's Family Crisis Center, 7 F.3d 40, 42 (4th Cir. 1993); Harvey v. City of New Bern Police Dept., 813 F.2d 652, 654 (4th Cir. 1987). Its approach to equitable tolling highlights a division among the circuits regarding the appropriate use of that principle in Title VII statutes of limitations cases.

Cases such as this one exist only at the margin of the 90-day filing period. To say that Ms. Nguyen still had 80 days (App. A at 7) or 56 days (App. A at 8) within which to file suit swallows the equitable tolling argument: If a charging party believes that the 90 days expire on December 1, it does the party no good to be informed after the fact that her first 80 or 56 days count more than the last 10 or 36 days. Lawyers and judges know this best. Court filings are typically made on or slightly before the last allowed day, and that day is equally as effective as the earlier days.

Recognizing the value of receiving the full 90-day period, this Court has emphasized that the 90-day period for filing a Title VII claim against a private employer with the EEOC was not jurisdictional but is, like a statute of limitations, subject to

equitable tolling. Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982); see also Irwin v. Dept. of Veterans Affairs, 498 U.S. 89 (1990) (holding the same in the Federal sector). In Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984), this Court discussed the application of equitable tolling and the importance of diligence on the part of the claimant.

Here, Ms. Nguyen was the picture of diligence given that she believed she had until December 1, 1997, to file her claim. She had her neighbor collect and protect her mail while she was on vacation. Within days of returning and receiving the EEOC letter, Ms. Nguyen sought legal advice on the merits of her claim, obtained with difficulty her EEOC file, obtained advice from the EEOC as to when the 90-day period to sue began, obtained an affidavit from a doctor in support of the merits of her case, and pursued settlement options instead of rushing to litigate. Ms. Nguyen did not waste one of her 90 days. Ms. Nguyen promptly filed suit *pro se* on the day after Thanksgiving, November 28, not waiting until December 1.

The reason why Ms. Nguyen believed she had until December 1, 1997, to file her claim is due in large to the advice from both a case worker and a supervisor at the EEOC who informed her that she had the full 90 days since her date of receipt to file her claim, although she would carry the burden of establishing that date. Ms. Nguyen met her burden by providing for the record her sworn affidavit and that of her neighbors, both of which established the date of her vacation and the date of her and her husband's actual receipt of the mail. Id.

The EEOC's advice (including the statements in the letter based upon the EEOC regulations) was misleading and ultimately erroneous in the Fourth Circuit. Ms. Nguyen relied

to her detriment on the advice. Other circuits have applied equitable tolling when the EEOC provides erroneous advice. See, e.g., Simpkins v. Washington Metropolitan Area Transit Authority, 132 F.3d 1482, 1997 WL 702349 (D.C. Cir. 1997) (unpublished opinion) (EEOC misinformation justifies tolling); Anderson v. UNISYS Corp., 47 F.3d 302, 306-7 (8th Cir. 1995) (collecting cases in various circuits) holding that equitable tolling may be justified when an administrative agency misleads a complainant); Johnson v. Al Tech Specialties Corp., 731 F.2d 143, 145 (2nd Cir. 1984) (Johnson unable to rebut Rule 6(e) presumption because Johnson would not follow his counsel's advice and file an affidavit regarding the erroneous advice from EEOC that he could file his complaint late); Chappell v. EMCO Machine Works Co., 601 F.2d 1295 (5th Cir. 1979) (collecting cases where EEOC misleading letters and advice justified invoking equities). See also Wagher v. Guy's Foods, Inc., 765 F.Supp. 667 (D. Kan. 1991) (applying equitable tolling where claimant took reasonable steps to safeguard her mail).

Despite this authority favoring equitable tolling in this case, the Fourth Circuit ignored the EEOC's bad advice and laid full blame on Ms. Nguyen.[11] The Fourth Circuit's decision is not supported by fact or law, and highlights the division between the Fourth Circuit and other Circuit Courts regarding the appropriate application of equitable tolling. Ms. Nguyen did everything she should have done to ensure that her suit was

[11] The fact that Ms. Nguyen was represented by counsel for very nearly the last 17 days of her filing period hardly ends the debate. During those 17 days, Ms. Nguyen diligently pursued her claim with the good faith belief that her filing period ended on December 1, so stated in plain language in the demand letter. When confronted with the first hint of objection to that conclusion and a rejection of settlement overtures by the hospital on November 24, Ms. Nguyen filed suit promptly.

timely filed, but fell victim to an interpretation of the federal law that deviates from other circuits. This Court should grant review to ensure that federal law is applied fairly and consistently to Ms. Nguyen and claimants like her.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 1999

APPENDIX

APPENDIX A

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 98-2215

GIAO NGUYEN,

Plaintiff-Appellant,

v.

INOVA ALEXANDRIA HOSPITAL,

Defendant-Appellee.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Amicus Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Albert V. Bryan, Jr., Senior District Judge.
(CA-97-1935-A)

Argued: June 8, 1999

Decided: July 30, 1999

Appendix A

Before MICHAEL, Circuit Judge,
HOWARD, United States District Judge for the
Eastern District of North Carolina, sitting by designation,
and FRIEDMAN, United States District Judge, for the
Eastern District of Virginia, sitting by designation.

Affirmed by an unpublished per curiam opinion.

* * *

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Giao Nguyen (hereinafter "Nguyen") filed suit in federal district court against her former employer, INOVA Alexandria Hospital (hereinafter "Alexandria Hospital") and claimed national origin discrimination, harassment and retaliation during the course of and in the termination of employment. Nguyen claimed that such alleged discriminatory acts by her employer are in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* Alexandria Hospital moved for summary judgment on all of Nguyen's claims.

The district court dismissed Nguyen's action as untimely. Nguyen moved for reconsideration of the district court's order and such motion was denied. Finding no error below, we affirm.

Appendix A

I.

Nguyen worked as a registered nurse in the intensive care unit of Alexandria Hospital from December 7, 1981, until her termination on June 18, 1996. After exhausting internal review procedures at the Hospital, on February 15, 1997, Nguyen filed a charge with the City of Alexandria's Office for Human Rights alleging national origin discrimination, harassment and retaliation. On February 20, 1997, the complaint was forwarded to the Equal Employment Opportunity Commission ("EEOC") pursuant to the worksharing agreement between the local agency and the EEOC.

The EEOC found no probable cause for discrimination and issued a Notice of Right to Sue by regular mail and date-stamped August 20, 1997. The letter informed Nguyen that "should you wish to pursue the matter in court, suit must be filed within 90 days of your receipt of this letter." The EEOC also included a document entitled "Dismissal and Notice of Rights" explaining the limitations period. In the document, the EEOC reiterated that "[i]f you decide to sue, you must sue *WITHIN 90 DAYS* from your receipt of this Notice."

The Notice of Right to Sue arrived at Nguyen's mailbox sometime between August 22, 1997 and September 1, 1997. Nguyen was on vacation during that time and had specifically asked her neighbors to collect her mail while she and her family were away. When Nguyen and her family returned from vacation on September 1, 1997, Nguyen's husband picked up their mail from the neighbors. The next day, on

September 2, 1997, Nguyen opened the EEOC's letter.

On September 9, 1997, Nguyen telephoned legal counsel and sought advice on her discrimination case. An initial consultation was originally scheduled for September 19, 1997, and Nguyen was told to bring her EEOC complaint file to the meeting. Nguyen did not retrieve her file in time for the meeting and the meeting was rescheduled for September 26, 1997.[1] Apparently at that meeting, legal counsel told Nguyen to gather corroborating evidence in support of her allegations.

On November 20, 1997, Nguyen's lawyers first contacted counsel for Alexandria Hospital seeking a settlement of Nguyen's potential claims. In the letter, Nguyen's counsel addressed the 90-day limitations period:

> Given the short statute of limitations, I must ask that you provide me with a response as soon as possible. The 90-day right to sue letter is dated August 20, 1997, and Ms. Nguyen received it September 2, 1997, when she and her family returned from an out-of-town trip. Therefore, Ms. Nguyen will need to file a civil action no later than December 1, 1997, in order to protect her rights.

Counsel for the Hospital promptly responded by letter on November 24, 1997, and indicated that a response to the

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1. Nguyen claims that the delay in retrieving her file is attributed to the EEOC. This allegation is discussed later in the opinion.

settlement proposal would be forthcoming. Two days later, counsel for the Hospital rejected the settlement proposal and specifically addressed the limitations period:

> Lastly, I am not at all convinced that Ms. Nguyen's claim is not barred by the statute of limitations, and am curious about her assertion of when she allegedly "received" the 90-day right-to-sue letter. If suit is filed, we will pursue that issue thoroughly.

On November 28, 1997, Nguyen filed a *pro se* complaint in the United States District Court for the Eastern District of Virginia. Alexandria Hospital moved to dismiss on the ground that Nguyen had pled under the Alexandria Human Rights Code for which there is no cause of action. The district court permitted Nguyen to amend her complaint and plead claims under Title VII.

Alexandria Hospital filed a motion for summary judgment on all claims. The district court dismissed the action as untimely. The district court held that the 90-day period began to run on the day the EEOC letter was delivered by the U.S. Postal Service to Nguyen's residence. Since the date of actual delivery was unknown, the district court applied the presumption of a three-day delivery period under Rule 6(e) of the Federal Rules of Civil Procedure. Thus, the district court found that the EEOC letter had been delivered on August 23, 1997, and the 90-day period expired on November 21, 1997, seven days before the action was filed and therefore the action was time-barred. In addition, the court found that no reasons existed to apply the doctrine of

equitable tolling. Nguyen filed a motion for reconsideration and the same was denied.

II.

We must review the district court's grant of summary judgment in favor of Nguyen *de novo* on appeal. In that sense, we must apply the same standard used by the district court itself. *See Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 233 (4th Cir. 1991). "[T]he non-moving party is entitled to have his evidence as forecast assumed, his version of that in dispute accepted, and the benefit of all favorable inferences." *Id.* at 233. *See also EEOC v. Clay Printing Co.*, 955 F.2d 936, 940 (4th Cir. 1992).

The parties dispute whether delivery of a notice of right to sue letter to a claimant's home, where it is picked up by a delegated neighbor, is effective notice of the claimant's judicial rights. 42 U.S.C. § 2000e-5(f)(1) provides that if the EEOC finds no probable cause on a complaint, the agency "shall so notify the person aggrieved and within 90 days after the giving of such notice a civil action may be brought . . . ." *Id.* The agency's own regulations direct that a notice of right to sue shall include "[a]uthorization to the aggrieved person to bring a civil action under Title VII . . . within 90 days from receipt of such authorization." 29 C.F.R. § 1601.28(e)(1). The EEOC's letter informs the individual that he or she has 90 days after receipt in which to file suit. *Id.*

The date on which the claimant received the EEOC letter becomes critical in determining the commencement of the

90-day period. In ascertaining the delivery date, we have rejected an "actual receipt" rule. *Harvey v. City of New Bern Police Dep't*, 813 F.2d 652, 654 (4th Cir. 1987). Instead, we have engaged in "a case-by-case examination to determine if an equitable tolling of the filing period is appropriate." *Id.* at 654. In the context of individual cases, we have held that delivery of a notice of right to sue triggered the limitations period. *See id.* (wife's receipt of notice letter triggered the 90-day period); *see also Watts-Means v. Prince George's Family Crisis Ctr.*, 7 F.3d 40, 42 (4th Cir. 1993) (Postal Service's notice to claimant that she could pick up the letter triggered the limitations period); *Harper v. Burgess*, 701 F.2d 29, 30 (4th Cir. 1983) (notice to plaintiff's counsel triggered limitations period and failure to notify EEOC of change of address was bar to equitable tolling).

We have also utilized procedural rules in ascertaining the receipt date of notice of right to sue letters. Of course, if the actual date of receipt is confirmed by evidence, that date governs. *Dixon v. Digital Equip. Corp.*, 976 F.2d 725, 1992 WL 245867, *1 (4th Cir. Sept. 30, 1992) (unpublished); *Williams v. Enterprise Leasing Co. of Norfolk/Richmond*, 911 F. Supp. 988, 991-992 (E.D. Va. 1995). If the date is unknown, however, it is presumed that service by regular mail is received within three days pursuant to Rule 6(e) of the Federal Rules. Fed. R. Civ. P. 6(e); *Baldwin County Welcome Ctr. v. Brown*, 466 U.S. 147, 148, n.1, 104 S. Ct. 1723, 1724 (1984) (suggesting that Rule 6(e) applies when parties dispute the date of receipt).[2]

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2. Federal Rule of Civil Procedure 6(e) states:

(e) Additional Time After Service by Mail.

(Cont'd)

Appendix A

In this matter, we hold that the limitations period began to run when the Notice of Right to Sue was delivered to Nguyen's home and picked up by a designated neighbor. The letter was mailed on August 20, 1997, but the date on which the letter was actually delivered to Nguyen's home is in dispute.[3] In this situation, the district court's application of the presumption rule under Rule 6(e) was proper. Applying the three day rule, the letter is presumed to have been delivered to Nguyen on August 23, 1997, and the limitations period expired ninety days later on November 21, 1997.

The remaining question we must consider is whether there are equitable considerations sufficient enough to support the exercise of equitable tolling. We find that the equities do not weigh in favor of extending the 90-day period. Nguyen delegated her neighbors to pick up her mail while she and her family were on vacation. The neighbors acted as Nguyen's agent when they collected the Notice of Right to Sue letter and all other mail delivered to Nguyen's home between August 22, 1997, and September 1, 1997.

In any case, Nguyen had ample opportunity to file a

(Cont'd)

> Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

3. Indeed, Nguyen testified at her deposition that she is in possession of the envelope presumably showing the post-mark date on which the letter was sent. By not submitting the envelope as evidence, Nguyen has placed the issue of notice in dispute.

complaint once she was in actual receipt of the EEOC letter. Nguyen opened the EEOC letter on September 2, 1997. Even then, Nguyen had 80 days to file her complaint before the 90-day deadline on November 21, 1997.[4] In similar situations, we have found that there were no grounds for equitable tolling. *See Watts-Means*, 7 F.3d at 42 (equitable tolling inappropriate where plaintiff had 85 days to file claims); *Harvey*, 813 F.2d at 654 (equitable tolling inappropriate where plaintiff had 84 days to file his complaint).

Appearing as amicus curiae, the EEOC urges us to adopt a rule that excuses the limitations period for claimants who ask their neighbors to collect their mail while away from home.[5] When pressed at oral argument, however, the EEOC conceded that it has implemented cost-cutting measures and no longer sends its notice of right to sue letters by certified mail. The agency's current mailing system means that the date of actual delivery may not always be ascertainable. Nonetheless, we do not think that an agency's budgetary considerations provide a sound rationale for an open-ended time extension under Title VII. That is especially so in this case where Nguyen's neighbors acted as her agent and received the Notice of Right to Sue on her behalf.

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4. This is computed by adding the actual number of days left in the 90-day period from September 2, 1997, the date Nguyen opened the letter.

5. In defense of their position, the EEOC asserts that claimants have a right to privacy in the EEOC charge proceedings. According to the EEOC, the claimant's right of privacy would be undermined if the claimant were compelled to inform her neighbors. We find the EEOC's reasoning to be unpersuasive.

Indeed, this is a much different situation than what we encountered in *Ish v. Arlington County Virginia*, 918 F.2d 955, 1990 WL 180127, *1 (4th Cir. Nov. 21, 1990) (unpublished). In that case, the receptionist of the claimant's landlord had not been designated to collect the claimant's mail, but she had come into receipt of his notice of right to sue. We held that the limitations period did not commence upon receipt by the receptionist since she was not acting as the agent for the claimant. *Id.* Here, by contrast, Nguyen's neighbors were acting as Nguyen's agent and were the intended recipient of the EEOC letter.

Nguyen's argument that Alexandria Hospital induced her to sit on her rights is unavailing. Through her lawyers, Nguyen did not even notify Alexandria Hospital of her potential suit until November 20, 1997, or one day before the 90-day period ended. Alexandria Hospital promptly responded to Nguyen's offer of settlement four days later. There simply is no basis for this argument.

Nguyen's contention that she was hindered by administrative delay is equally unavailing. Nguyen asserts that the EEOC did not provide a copy of her administrative file until September 26, 1997. As of that date, Nguyen had 56 days to file her complaint. Here, the legal mistake was Nguyen's own fault and there is no justification for tolling the 90-day period. *See Citicorp Person-to-Person Fin. Corp. v. Brazell*, 658 F.2d 232, 234-235 (4th Cir. 1981).[6]

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6. We find that all of Nguyen's other grounds for equitable tolling are without foundation.

Appendix A

III.

For the reasons set forth, we affirm the district court's dismissal of Nguyen's claims as time-barred.

AFFIRMED

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 97-1935-A

GIAO NGUYEN,

Plaintiff,

v.

INOVA ALEXANDRIA HOSPITAL,

Defendant.

MEMORANDUM OPINION

Plaintiff Nguyen brought this three-count action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, alleging unlawful discrimination and harassment on the basis of plaintiff's national origin (Vietnamese), discriminatory termination of plaintiff's employment, and retaliation. Defendant INOVA Alexandria Hospital ("Hospital") now moves for summary judgment pursuant to Fed. R. Civ. P. 56. Because the court concludes that plaintiff's action is time-barred, defendant's motion will be granted.

Background

Plaintiff was employed as a Registered Nurse in the

Hospital's Intensive Care Unit ("ICU") from December 7, 1981 until her employment termination on June 18, 1996. Defendant contended that plaintiff's employment termination was based on two incidents of unsatisfactory work performance, taking place in May 1996. Specifically, on May 22, 1996, plaintiff allegedly disobeyed a consulting physician's instructions regarding the administration of medication to an ICU patient. On May 29, 1996 plaintiff allegedly abandoned two ICU isolation patients while "resting" in an empty patient room. Defendant asserted that plaintiff was later replaced by an individual of African-American descent.

Following her employment termination, plaintiff filed an internal grievance with the Hospital's Vice President for Nursing and Support Services, who upheld the termination. On plaintiff's appeal to the Hospital's Employee Review Board, the termination was again upheld, after a documents review and a hearing. On February 15, 1997, plaintiff filed a complaint with the Alexandria Office of Human Rights. On February 20, 1997, plaintiff's complaint was forwarded to the Equal Employment Opportunity Commission ("EEOC") for investigation.

The EEOC found no probable cause for discrimination and issued a right-to-sue letter, which was date-stamped August 20, 1997. Plaintiff concedes that the EEOC letter was sent by regular mail, but asserts that she does not know on what date the EEOC letter arrived at her house. Plaintiff admits, however, that the letter arrived in her mailbox during the time she was on vacation — between August 22, 1997 and September 1, 1997. Plaintiff claims that she was in actual

receipt of the letter on September 2, 1997. Plaintiff filed this action on November 28, 1997.

Standard for Summary Judgment

Summary judgment is appropriate only when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the court is not to weigh the evidence, but rather must determine whether there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In so doing, the court must view the underlying facts in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The party seeking summary judgment bears the initial responsibility of informing the district court of the basis for its motion, and of establishing — based on the relevant portions of the pleadings, depositions, affidavits, if any, answers to interrogatories, and admissions on file — that there is no genuine issue of material facts. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The nonmoving party must go beyond the pleadings and must, by its own affidavits and by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial. *Id.* at 324.

There is no genuine issue for trial where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. *Matsushita*, 475 U.S. at 587. The nonmoving party must do more than simply show that there

is some metaphysical doubt as to the material facts. *Id.* at 586. Material facts are those facts whose determination will affect the outcome of the lawsuit, and an issue of material fact is genuine if the evidence is such that a reasonable jury could find for the nonmoving party. *Anderson*, 477 U.S. at 248.

Discussion

Defendant Hospital argues that plaintiff's claim is time-barred because she failed to file this action within the 90-day period prescribed by the statute, 42 U.S.C. § 2000e-5(f)(1). Defendant cites *Watts-Means v. Prince George's Family Crisis Center*, 7 F.3d 40 (4th Cir. 1993), and *Williams v. Enterprise Leasing Co. of Norfolk/Richmond*, 911 F. Supp. 988 (E.D. Va. 1995), as mandating such conclusion. The court agrees.

In *Watts-Means*, the Fourth Circuit held that the 90-day limitations period is triggered not by the actual receipt by the plaintiff of the EEOC letter, but rather by the U.S. Postal Service's delivery of the letter, thus making it available to plaintiff. 7 F.3d at 42. Thus, the 90-day limitations period, here, did not begin to run on September 2, 1997, when plaintiff actually received the EEOC letter, but on the day when the letter was delivered to plaintiff's house.

Plaintiff argues that because the date on which the EEOC letter was delivered to her house is unknown, a genuine issue of a material fact exists, precluding summary judgment in favor of defendant Hospital. Plaintiff's analysis, however, is flawed. The fact that the date of delivery is unknown does not create a genuine issue of a material fact.

Appendix B

There is no dispute between the parties that the date of delivery is unknown. There is also no dispute that the EEOC letter was sent by regular mail and that it was date-stamped August 20, 1997. Under such circumstances, no genuine issue of fact remains, for the law mandates a 3-day delivery period. In *Williams v. Enterprise Leasing Co. of Norfolk/Richmond*, this court (Doumar, J.) applied the 3-day presumption in Fed. R. Civ. P. 6(e) in the context of delivery of an EEOC right-to-sue notice. Thus, where, as here, the delivery date is unknown but it can be established that the EEOC notice was sent via regular mail, it is presumed that delivery took place three days after the notice letter was sent.

Plaintiff attempts to dispute the date that the EEOC letter was sent, arguing essentially that the fact that the letter was dated August 20, 1997 does not establish that it was sent on that date. Plaintiff, however, presents no evidence whatsoever to support her apparent assertion that the letter was not sent on August 20, 1997. Plaintiff cannot create an issue of fact by merely asserting the existence of a metaphysical doubt. *See, Matsushita, supra*, 475 U.S. at 586. This is particularly so here where plaintiff has failed to produce the envelope that accompanied the letter, which would presumably show the date on which the letter was sent.

Thus, the court concludes that the EEOC letter is presumed to have been delivered to plaintiff on August 23, 1997, three days after the issuance of the letter, and that the 90-day limitations period expired on November 21, 1997, seven days before this action was filed. The court finds further that no reasons exist here to apply the doctrine of equitable tolling. Plaintiff was represented by counsel during

most of the 90-day period, and her argument that defendant induced her into not filing her action with the prescribed time is simply unconvincing.

Accordingly, the court concludes that plaintiff did not file this action within the prescribed period, and this action is therefore time-barred. Defendant's motion for summary judgment will be, therefore, granted, and this action will be dismissed with prejudice.

s/ Albert V. Bryan, Jr.
Albert V. Bryan, Jr.,
United States District Judge

Alexandria, Virginia
June 19th, 1998

Appendix B

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

GIAO NGUYEN,

Plaintiff,

v.

INOVA ALEXANDRIA HOSPITAL,

Defendant.

ORDER

This action comes before the court on defendant's motion for summary judgment pursuant to Fed. R. Civ. P. 56. Upon consideration of the parties' submissions and for the reasons set forth in the Memorandum Opinion filed herewith, it is hereby

ORDERED that defendant's motion is granted, and this action is hereby dismissed with prejudice.

s/ Albert V. Bryan, Jr.
Albert V. Bryan, Jr.,
United States District Judge

Alexandria, Virginia
June 19th, 1998

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

CIVIL ACTION NO. 97-1935-A

GIAO NGUYEN,

Plaintiff,

v.

INOVA ALEXANDRIA HOSPITAL,

Defendant.

ORDER

This action comes before the court on plaintiff Giao Nguyen's motion, pursuant to Fed. R. Civ. P. 59(e), to alter or amend this court's Order, entered on June 19, 1998, which Order granted summary judgment in favor of defendant INOVA Alexandria Hospital ("Hospital"). Upon consideration of the parties' submissions, it is hereby

ORDERED that plaintiff's motion is denied.

Plaintiff Nguyen brought this three-count action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*, alleging unlawful discrimination and harassment on the basis of plaintiff's national origin (Vietnamese), discriminatory termination of plaintiff's

employment, and retaliation. On defendant Hospital's motion for summary judgment, this court concluded that plaintiff's action was time-barred, and thus entered an Order of summary judgment in favor of defendant Hospital.

Plaintiff now moves this court to reconsider its earlier ruling, but offers no new evidence that was not available before this court's earlier ruling. Nor does plaintiff show that this court committed a clear error of law. That other Circuits may follow different rules in ascertaining the date on which the 90-day limitations period begins running does not change the fact that the law in this Circuit is clear and settled, even if different from other Circuits. Accordingly, the court finds no bases on which to alter or amend its earlier ruling of June 19, 1998. Plaintiff's motion, therefore, is denied.

s/ Albert V. Bryan, Jr.
Albert V. Bryan, Jr.,
United States District Judge

Alexandria, Virginia
July 17th, 1998

APPENDIX D

FILED
August 24, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-2215
CA-97-1935-A

GIAO NGUYEN

Plaintiff – Appellant

v.

INOVA ALEXANDRIA HOSPITAL

Defendant – Appellee

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Amicus Curiae

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is

of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor
CLERK

Supreme Court, U.S.
FILED
JAN 24 2000
CLERK

(2)

No. 99-874

IN THE
Supreme Court of the United States

GIAO NGUYEN,

Petitioner,

v.

INOVA ALEXANDRIA HOSPITAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Where the circuit courts are in agreement that receipt of an EEOC right-to-sue letter by someone other than the complainant in appropriate circumstances can start the running of the 90-day period for filing suit under Title VII of the Civil Rights Act, and where no court has held that a neighbor designated by the complainant to receive her mail in her absence cannot be an agent of the complainant for purposes of receiving a right-to-sue letter, should this Court review the Fourth Circuit's decision holding that a neighbor designated by the complainant to pick up her mail and hold it safe is complainant's agent for purposes of receipt of the EEOC's right-to-sue letter?

2. Where the circuit courts are in general agreement that, in a constructive receipt case, if it is uncertain when an EEOC right-to-sue letter is received, the 90-day period for filing suit begins to run three days after the EEOC mails the letter, and the Fourth Circuit followed that rule here, is review by this Court warranted?

3. Where Petitioner's equitable tolling analysis depends on a review of the unique circumstances of this case, including that Petitioner had the early advice of an attorney and could have filed suit long before the deadline, is this fact-specific case appropriate for review by this Court?

STATEMENT PURSUANT TO RULE 29.6

Inova Alexandria Hospital is a division of Inova Health System. Neither Inova Alexandria Hospital nor Inova Health System is a publicly held corporation, and no publicly held company owns 10% or more of the stock of Inova Health System or Inova Alexandria Hospital.

TABLE OF CONTENTS

	Page
Counterstatement of the Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Cited Authorities	v
Statement of the Case	1
A. Procedural Background And Facts	1
1. Reasons For The Discharge	1
2. Receipt Of The Right To Sue Letter ..	3
3. Nguyen's Contact With An EEOC Case Worker And Supervisor After Nguyen's Receipt Of The Right-To-Sue Letter	4
B. The Court Of Appeals' Decision	5
Reasons for Denying the Writ	6
I. There Is No Split In The Circuits On The Question Whether A Complainant Can Be Charged With Receipt Of The EEOC Notice By A Neighbor Where She Specifically Designates The Neighbor To Recover And Hold Her Mail	8

Contents

Page

II. Where The Circuit Courts, Including the Fourth Circuit, Are In General Agreement That If The Date Of Receipt Of The EEOC Right-To-Sue Letter Is Not Known The Court Will Presume It Was Received Within Three Days After The Date Of The Letter, There Is No Issue Warranting This Court's Review 16

III. The Court Of Appeals Fact-Specific Analysis Of Whether Nguyen's Case Requires Equitable Tolling Does Not Warrant Review By This Court 18

Conclusion 20

TABLE OF CITED AUTHORITIES

Page

Cases:

Baldwin County Welcome Center v. Brown, 466 U.S. 147 (1984) 16, 19

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Espinoza v. Missouri Pacific Railroad Co., 754 F.2d 1247 (5th Cir. 1985) 9

Giao Nguyen v. Inova Alexandria Hospital (4th Cir. No. 98-221) (1999) 8

Hernandez v. Commissioner of Internal Revenue, 490 U.S. 680 (1989) 19

Ish v. Arlington County, Virginia, 918 F.2d 955, 1990 WL180127 (4th Cir. Nov. 21, 1990) 6

Jones v. Madison Service Corp., 744 F.2d 1309 (7th Cir. 1984) 10

Josiah-Faedwor v. Communications Satellite Corp., 785 F.2d 344 (D.C. Cir. 1986) 9, 10

Law v. Hercules, 713 F.2d 691 (11th Cir. 1983) ... 9

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	Page
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Ringgold v. National Maintenance Corp., 796 F.2d 769 (5th Cir. 1986)	10
Robinson v. Dalton, 107 F.3d 1018 (3d Cir. 1997)	19
Scholar v. Pacific Bell, 963 F.2d 264 (9th Cir. 1992)	10
Seitzinger v. Reading Hospital and Medical Center, 165 F.3d 236 (3d Cir. 1999)	16
Sherlock v. Montefiore Medical Center, 84 F.3d 522 (2nd Cir. 1996)	16
Smith-Haynie v. District of Columbia, 155 F.3d 575 (D.C. Cir. 1998)	16
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	Page
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United States v. Johnson, 268 U.S. 220 (1925)	18
Rules:	
F. R. Civ. P. 6(e)	5
F. R. Civ. P. 56(e)	4
Fourth Circuit Rule 36(c)	10
Other Authorities:	
Restatement (Second) of Agency, § 1	11
Restatement (Second) of Agency, § 3	12
Restatement (Second) of Agency, § 21	11
29 C.F.R. § 1601.08(e)	15
29 C.F.R. § 1601.28	15

STATEMENT OF THE CASE

A. Procedural Background And Facts

Respondent adopts the statement of the facts and procedure in the opinion below (Pet. App. 2a-6a) with the following additions.

1. Reasons For The Discharge

Respondent Inova Alexandria Hospital ("the Hospital") discharged Petitioner Giao Nguyen for two reasons. First, on May 22, 1996, without prior authorization, and contrary to the specific directives of the attending cardiologist, Dr. Castro, Nguyen substantially increased the dosage of Dobutamine to a critically ill, 82 year-old ICU heart patient. (A.E. 119, 202, 206, 208-11, 212, 414-15). As a result of Nguyen's unilateral increase in the drug's dosage, the patient developed an abnormally rapid pulse and a heart rate of between 120 to 130 beats per minute. *Id.* at 406, 412, 414-15. This elevated heart rate placed the patient in a life-threatening situation. A.E. 418. In a letter to the Hospital, Dr. Castro requested that Nguyen never again care for his patients. *Id.* at 404-08, 421.

Second, six days later, on May 28, 1996, during the 11:00 p.m. to 7:00 a.m. shift, Nguyen was responsible for caring for two ICU isolation patients in ICU rooms 7 and 8.[1] (A.E. 225-27). During Nguyen's shift, other ICU nurses

1. An ICU patient is put in "isolation" when the patient has a contagious condition that requires him to be kept separate from other patients. (A.E. 227) One of the patients assigned to Nguyen while she was "resting" was on a ventilator, a machine that assists breathing. *Id.* at 318.

heard alarms from Nguyen's patients and, not being able to locate Nguyen, answered the alarms. *Id.* at 318-19. After more than one hour of not being able to locate Nguyen, Nursing Supervisor Anne Vispo ("Vispo") found Nguyen "resting" under a blanket in a reclining chair in ICU Patient Room No. 1, across from ICU Rooms 7 and 8 and out of sight of her patients.[2] *Id.* at 228, 230, 236-37, 425.

In her deposition, Nguyen acknowledged that, while she was "resting" in ICU Room No. 1 with a blanket over her, the doors were closed to ICU Rooms 7 and 8 across the hall containing her two patients. (A.E. 238). Nguyen took the position that she "probably" could have heard her patients, one of whom was on a ventilator, if they had called out in distress while Nguyen was "resting" across the hall. *Id.* at 239.

On May 31, 1996, ICU Supervisor Deborah Capron counseled Nguyen about abandoning her patients and about the Dobutamine incident. (A.E. 313-14, 317-18). With respect to her unilateral increase in the Dobutamine dosage, Nguyen took the position that she had done nothing wrong and had in fact saved the patient's life. *Id.* at 313. Nguyen denied any culpability with respect to neglecting the two "ICU isolation" patients. *Id.* at 238. After an investigation of this incident by Capron and Hospital Director of Human Resources Coleen Collins, the Hospital determined that Nguyen had abandoned her patients and that this conduct,

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2. Nguyen's choice of Patient Room No. 1 for a "rest" was particularly confounding because the Hospital has a cafeteria, a conference room, a nurse's report room and a vending machine room available for breaks. (A.E. 320-21, 383). Moreover, there is an "overabundance" of chairs in the public area of the ICU for nurses to sit down and rest. *Id.* at 384-85.

together with her refusal to follow the doctor's orders regarding administration of medication, necessitated her discharge. *Id.* at 316-17, 332-33, 361-67, 371-72, 391-92.

2. Receipt Of The Right To Sue Letter

Nguyen testified at her deposition that she had called the EEOC about when a decision would be made on her charge and was told that she would hear from them "within about six months" of the time in February 1997 that the charge was filed. (A.E. 169-70). Nguyen testified that she did not know the exact date the EEOC's Notice of Right-to-Sue letter arrived at her house, but admitted that it arrived at her mailbox by regular mail during the time she was on vacation in Ocean City, Maryland between August 22, 1997[3] and September 1, 1997.[4] *Id.* 168-72, 240-242. Nguyen stated that the last day she picked up her mail before her vacation was August 21, and that she did not "recall" seeing the EEOC's Right-to-Sue letter on that day. *Id.* at 161-62. Before Nguyen went on vacation, she instructed Kathy and Kurt Thompson, her neighbors who lived in the same cul-de-sac, to pick up her mail and keep it safe and secure until she returned on September 1, 1997. *Id.* at 162-64. She also gave her neighbors a telephone number where she could be reached

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3. Contrary to Petitioner's statement of the facts (Pet. 3), Nguyen testified that she did not actually leave her home on August 22; she "went out" and celebrated her birthday on that date, but did not pick up her mail. (A.E. 160). She actually left for Ocean City on August 23. *Id.*

4. Although Nguyen testified at her deposition that she was in possession of the envelope from the EEOC, she failed to produce that envelope when requested in discovery. (A.E. 164).

while on vacation. *Id.* at 166-67. She testified that the Thompsons "rarely" called unless something happened to Nguyen's house. *Id.* at 167. Nguyen testified that her neighbors picked up her mail on other occasions when Nguyen was away, and that she had "no question" that her neighbors would keep her mail "safe and secure" until her and her husband's return. *Id* at 163.

Nguyen returned from her vacation late in the night of August 31 to September 1. (A.E. 164). Kathy Thompson averred that she gave the accumulated mail to Nguyen's husband on Monday, September 1, which was Labor Day *Id.* at 804. Nguyen recalled opening the EEOC's Right-to-Sue letter on September 2. *Id.* at 166. She did not know what day the Thompsons retrieved the EEOC's letter or whether the Thompsons checked for specific mail. *Id.* at 168.

3. Nguyen's Contact With An EEOC Case Worker And Supervisor After Nguyen's Receipt Of The Right-To-Sue Letter

Nguyen averred that at an unspecified time she called the EEOC Washington Field Office and asked "given this situation, when my complaint must be filed." (July 6, 1998 Affidavit of Giao Nguyen attached as Exhibit D to Plaintiff's Memorandum of Points And Authorities In Support of Plaintiff's Rule 56(e) Motion, at p. 3, ¶ 11). Nguyen's affidavit states: "The reply of the case-worker and the supervisor was that it would be due 90 days after I received it, regardless of what the date on the letter is. They informed me that it would be up to me to establish when I received it." The affidavit does not reveal whether Nguyen told the EEOC employees about her neighbors being designated by her to receive her mail or about any of the other circumstances surrounding receipt of the EEOC right-to-sue letter.

B. The Court Of Appeals' Decision

In its unpublished decision the court of appeals characterized the principal issue in this case as: ". . . whether delivery of a notice of right-to-sue letter to a claimant's home, where it is picked up by a delegated neighbor, is effective notice of the claimant's judicial rights." (Pet. App. 66). The court then observed that, where someone other than the claimant first received the right-to-sue letter, the court has engaged in a case-by-case examination to determine if an equitable tolling of the filing period is appropriate. (Pet. App. 7a). The court of appeals also noted that where the actual date of receipt of the EEOC notice is confirmed by evidence, that date governs. *Id.* If, however, the date is unknown, the court will presume, in accordance with Rule 6(e), F. R. Civ. P., that where there is service by regular mail, the letter was received within three days. *Id.*

The court of appeals found that in this case the limitations period began to run when the Notice of Right-to-Sue was delivered to Nguyen's home *and picked up by a designated neighbor.*" (Pet. App. 8a). (Emphasis added). Because it was not certain when this actually occurred, the court of appeals applied the three-day presumption in Rule 6(e), finding that the limitations period expired on November 21, 1997. *Id.* at 8a.

The court of appeals then turned to the question whether the case presented equitable considerations that were sufficient to support tolling of the statute. (Pet. App. 8a). The court of appeals noted that after Nguyen delegated to her neighbors the job of picking up her mail while her family was on vacation, the neighbors acted as Nguyen's agent when they collected the Notice of Right-to-Sue and all other mail

delivered to Nguyen's house between August 22, 1997 and September 1, 1997. *Id.* The court of appeals here distinguished its decision in *Ish v. Arlington County, Virginia*, 918 F.2d 955, 1990 WL180127, *1 (4th Cir. Nov. 21, 1990) (unpublished) permitting equitable tolling where a claimant's landlord's receptionist, who had received the Notice of Right-to-Sue, had not been designated by the claimant to collect claimant's mail. *Id.*

The court of appeals rejected Nguyen's arguments for equitable tolling, noting that: (1) on September 2, when Nguyen opened the EEOC's letter, she still had 85 days to file her suit; (2) when on September 26 she received the EEOC's administrative file she still had 56 days to file her suit; and (3) that the Hospital did not induce Nguyen to sleep on her rights. *Id.* at 9a-10a Accordingly, the court of appeals found that Nguyen's lawsuit was time-barred. *Id.* at 11a.

REASONS FOR DENYING THE WRIT

The court of appeals' decision in this case turns on its finding that Nguyen's neighbors, whom she directed to pick up and hold her mail, were her agents for purposes of her receipt of the EEOC right-to-sue letter and the beginning of the running of the 90-day period in which she could file her lawsuit. No other circuit court is in disagreement with that holding. Thus, no circuit court requires receipt of the EEOC Right-to-Sue letter by the charging party and no other person in all circumstances to start the running of the 90-day period. There is general agreement by the circuit courts and by the EEOC that there can be constructive notice to the complainant when the EEOC's right-to-sue letter is received by someone other than plaintiff, if the circumstances warrant such a finding. No circuit court has held that a neighbor,

specifically designated by the complainant to receive the complainant's mail in her absence, cannot stand in the complainant's shoes for purposes of receipt of the notice and the running of the 90-day period. In fact, this appears to be the first time the question of whether receipt of the Right-to-Sue letter by a neighbor designated by the complainant to pick up and retain her mail is sufficient to start the running of the 90-day period. The issue is not a recurring one and not of importance in the administration of the statute. The court of appeals, in any event, was correct in finding that Nguyen's neighbors were her agents for purposes of receipt of the EEOC right-to-sue letter where she specifically designated them to pick up her mail and could have communicated with them concerning return addresses on the envelopes.

Also without merit is Petitioner's contention that in this case the Fourth Circuit diverged from other circuits in applying a presumption that the EEOC notice was received within three days of the date on the letter where the actual day of receipt was not ascertainable. Petitioner's argument is premised on the incorrect assumption that the EEOC notice was not "received" until the day Nguyen opened the EEOC letter, a date which was ascertainable. In fact, for purposes of running the statute of limitations, the letter was "received" by Nguyen's agents, her neighbors, on an unknown day in the period August 22 – August 31. Where, as here, the date of the agent's receipt is unknown, the circuit courts generally apply a presumption that the letter was received by the complainant within three days of the date on the letter or within three days of its postmark. That is an entirely reasonable presumption, and Petitioner has suggested no other. Accordingly, the Fourth Circuit's presumption that Nguyen's neighbors received the EEOC's letter three days after the date on the letter does not warrant review by this Court.

Petitioner's argument that the court of appeals erred in not applying equitable tolling principles, if accepted, will require this Court to analyze the unique factual circumstances of this case, a task best left to the district court and court of appeals. In any event, despite that she had early legal advice, Nguyen sat on her hands, permitting the lengthy time she had remaining to fritter away. She was not misled or delayed by the EEOC or anyone else. The court of appeals rightly concluded that her suit was time-barred.

I. There Is No Split In The Circuits On The Question Whether A Complainant Can Be Charged With Receipt Of The EEOC Notice By A Neighbor Where She Specifically Designates The Neighbor To Recover And Hold Her Mail

The Fourth Circuit held in this case that when the Notice of Right to Sue was delivered to Nguyen's home *and* picked up by a designated neighbor the limitations period began to run. Pet. App. 8a. Thus, the Fourth Circuit found that Nguyen's "neighbors acted as Nguyen's agent" for purposes of receipt of the EEOC letter. *Id.* at 8a; *see* Pet. App. 10a. That holding is not contrary to the decision of any circuit court and is based on accepted principles of agency law as well as sound equitable considerations.

Petitioner acknowledges that there is "near uniformity" in the circuit courts that, for purposes of the running of the statute of limitations, a complainant can be charged with constructive receipt by someone other than the complainant. (Pet. 22). The EEOC is in agreement with this view. Brief for the Equal Employment Opportunity Commission As Amicus Curiae in *Giao Nguyen v. Inova Alexandria Hospital* (4th Cir. No. 98-221 (1999)) at 10. Petitioner argues, however,

that the cases finding constructive receipt by someone other than the complainant are limited to the complainant's family members and attorneys. Petitioner contends that the constructive receipt rule should not be extended to neighbors. (Pet. 22-23)

Petitioner is right that the circuit courts uniformly permit satisfaction of the notice requirement based on receipt of the right-to-sue letter by a family member or the complainant's attorney in circumstances where the letter was delivered to the address designated by the complainant. The exceptions involve situations where the complainant, through no fault of her own, failed to receive the right-to-sue letter, or where there was some other equitable reason for tolling the statute until the complainant actually received the letter. *See, e.g., Espinoza v. Missouri Pacific Railroad Co.*, 754 F.2d 1247, 1249-51 (5th Cir. 1985) (where wife received letter while complainant was out of town and did not return for eight days, receipt by complainant's wife started the running of the statute); *Bell v. Eagle Motor Lines*, 693 F.2d 1086 (11th Cir. 1982) (receipt by complainant's wife started running of the statute); *Law v. Hercules*, 713 F.2d 691 (11th Cir. 1983) (90-day period began to run when complainant's son picked up the EEOC letter at the post office, not when it was seen by the complainant one or two days later); *Mahoney v. United States Postal Service*, 884 F.2d 1194, 1197 (9th Cir. 1989) (receipt of EEOC letter by former attorney starts running of limitations period where complainant never informed EEOC she would no longer be using that attorney for her case); *Josiah-Faedwor v. Communications Satellite Corp.*, 785 F.2d 344, 346-47 (D.C. Cir. 1986) (notice of right-to-sue imputed to complainant where attorney received the right-to-sue letter and complainant failed to inform EEOC of her address

change); *Jones v. Madison Service Corp.*, 744 F.2d 1309, 1314 (7th Cir. 1984) (attorney's receipt of right-to-sue letter starts the running of the limitations period); *Scholar v. Pacific Bell*, 963 F.2d 264, 267-68 (9th Cir. 1992) (receipt of right-to-sue letter by complainant's daughter at complainant's residence sufficient to start running of the limitation period); *Mosel v. Hill's Department Store, Inc.*, 789 F.2d 251 (3rd Cir. 1986) (receipt of right-to-sue letter by complainant's attorney starts the running of the limitation period). *St. Louis v. Alverno College*, 744 F.2d 1314, 1315 (7th Cir. 1984) (complainant who failed to advise EEOC that he had moved charged with constructive receipt at old address); *Million v. Frank*, 47 F.3d 385, 388 (10th Cir. 1995) (receipt by member of complaint's household sufficient to start running of the limitations period).

There are also circuit court cases holding that the running of the limitations period starts on the date that the EEOC letter was received at the complainant's attorney's office, even though it was not actually received by the complainant's attorney until later. *See Ringgold v. National Maintenance Corp.*, 796 F.2d 769 (5th Cir. 1986); *Josiah-Faedwor v. Communications Satellite Corp.*; *supra*, 785 F.2d at 345.

There is no split in the circuits on the issue decided in this case and the question is not one of importance in the administration of the statute. No circuit court has held that there can never be constructive receipt of the right-to-sue letter by someone other than complainant's family member or attorney. In fact, our research shows that this is the first case in which a circuit court has addressed the question of the effectiveness of the receipt of the right-to-sue letter by a designated neighbor. Thus, there is no conflict in the circuits. Indeed, since the Fourth Circuit's decision in this case is unpublished, it will not cite the case in the absence of unusual circumstances. Fourth Circuit Rule 36(c).

The question whether a neighbor specifically designated by the complainant to receive her mail can be the complainant's agent for purposes of receipt of the right-to-sue letter thus is not a recurring one in the administration of the statute. It is apparently unique in the decisional law. Accordingly, it is not of sufficient importance as a matter of statutory interpretation to warrant review by this Court.

In any event, the Fourth Circuit's analysis is correct. Under accepted principles of agency law, the Thompsons were Nguyen's agents for purposes of receipt of the EEOC's right-to-sue notice. "Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other to so act." Restatement (Second) of Agency, § 1. In this case, the Petitioner gave her consent for the Thompsons to act on her behalf, subject to her instructions, and the Thompsons' consented to so act. Petitioner's contention that a neighbor of a complainant can never act as an agent with respect to receiving a right-to-sue letter ignores a basic principle of agency law: the law of agency excludes no classes of individuals from acting as agents in connection with the completion of a particular task for a principal. Restatement (Second) of Agency, § 21. Any two parties can enter into a valid agency agreement. *Id.*

As the courts of appeals correctly concluded, the parties entered into an valid agency agreement for the receipt of Petitioner's mail while Petitioner was on vacation. Before Petitioner went on vacation, she instructed the Thompsons to pick up her mail, keep it safe and secure, and return it to the Nguyens when they returned from vacation. (A. 102, 109; A.E. 162-64). The Thompsons were also given a

telephone number where they could reach the Nguyens. *Id.* The Thompsons consented to this arrangement, picked up the mail as instructed, kept it safe and secure, and provided it to Mr. Nguyen upon the Nguyens return from vacation. (A.E. 163-66). Petitioners argument that the court of appeals wrongly concluded that an agency relationship was established without the Thompsons' knowledge or consent (Pet. 23) is directly contradicted by her deposition testimony. (A.E. 163-66). In fact, the Thompsons were well aware of their responsibilities with respect to collecting and safeguarding Nguyen's mail, and consented to the arrangement. *Id.*[5]

Petitioner states that it is fair to consider as agents for purposes of receipt of the EEOC's right-to-sue letter family members and attorneys, but no others, because "it is presumed that [family members and attorneys] have ready access to the complainant to inform her of the EEOC letter and possibly have been privy to the ongoing EEOC charge process." (Pet. 23). The cases cited by Petitioner, however, do not rely on either of these factors as prerequisites for imputing receipt to the complainant. Moreover, it is undisputed that the Thompsons actually had ready access to Petitioner by telephone while she was on vacation. Nor do Petitioner's cases hold that the complainant must have specifically authorized the family member or attorney to receive her mail. By requiring, at least in the case of neighbors, that the complainant specifically designate the neighbors to receive her mail, the Fourth Circuit has actually *added* a measure of protection not present in cases involving family members.

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5. It is irrelevant that Petitioner did not provide the Thompsons with any consideration in exchange for their agreement to act as Petitioners' agents. — Consideration is not required to establish an agency relationship. *Terbovitz v. Fiscal Court of Adair Cty.*, 825 F.2d 111, 116 (6th Cir. 1987); Restatement (Second) of Agency, § 3.

Petitioner suggests that the Fourth Circuit's ruling would be no different if Nguyen had hired a teenager to bring in the mail or if Nguyen had permitted the mail to pile up in her mail box. (Pet. 24 and n.10). There is nothing in the Fourth Circuit's decision to support Nguyen's broad reading of that decision. Indeed, the court of appeals stated that it proceeds on a case-by-case analysis of these kinds of situations, finding in one case that a landlord's receptionist was not complainant's agent. (Pet. App. 7a, 20a). A minor probably could not be complainant's agent. The Fourth Circuit did not address the circumstance of someone who deliberately does not arrange for collection of her mail when she knows that she may be receiving an EEOC right-to-sue letter around that time.

Petitioners rely on the fact that Nguyen did not direct her neighbors to do anything more than collect her mail. (Pet. 23). Nguyen's omissions do not make the Thompsons any less her agent for *receipt* of her mail. Moreover, Nguyen had been told by the EEOC that she would receive an EEOC determination of her charge within six months of the time she filed it. Since the charge was filed in February she should have known that the Commission would mail its right-to-sue letter no later than the end of August. Nguyen and the Thompsons could communicate by phone. It would have been a simple matter for Nguyen to have asked the Thompsons to look out for a letter with the EEOC's return address and to call her or to overnight mail the letter to her. There would be no privacy issue here because Nguyen never instructed the Thompsons not to look at individual pieces of mail and testified at her deposition that she was unaware of whether the Thompsons did so or not.

Nguyen benefited in three ways from her designation of the Thompsons to pick up her mail as opposed to having the post office hold her mail: (1) her husband was able to retrieve the family mail on Labor Day, when the post office was closed; (2) Nguyen or her husband did not have to wait in line at the post office on September 2; and (3) in collecting Nguyen's mail the Thompsons checked to ensure that all was well at Nguyen's house and reported any emergencies to her by telephone. Nguyen wanted these benefits but not the concomitant obligation to ensure that she was aware of important mail regarding filing deadlines. Like Nguyen's irresponsible behavior on her job, she now asks the Court to overlook her irresponsible behavior in not making specific provision for the Thompsons to notify her of receipt of the EEOC letter. In fact, Petitioner seeks to take advantage of her omissions in her instructions to the Thompsons to argue that she should not be charged with the Thompsons' receipt of the EEOC notice. (Pet. 23). The Court should reject Petitioner's unreasonable approach to the notice issue.

Without citation of authority, Petitioner argues that had the EEOC sent the right-to-sue letter by certified mail, as it had in the past, Nguyen's neighbors would "have had no right to obtain the EEOC notice." (Pet. 23). Petitioner has not shown, however, that a person anticipating a certified letter and knowing that she would be out of town could not have made arrangements with the post office to have a neighbor sign for the letter, including giving the neighbor written authorization to do so. In any event, Petitioner's "might have been" argument will not wash. The fact is that, as the court of appeals stressed (Pet. App. 23), the Thompsons did pick up Nguyen's mail, which included the EEOC letter. That is our case, not some hypothetical case.

Finally, Petitioner relies on the EEOC's support in its amicus brief in the court of appeals for Petitioner's argument that the constructive notice rule should not be extended to neighbors. (Pet. 24).[6] It is noteworthy, however, that the pertinent EEOC regulations do not support Petitioner's argument. The regulations at 29 C.F.R. § 1601.08(e) state:

> (e) Content of notice of right to sue. The notice of right to sue shall include:
>
> (1) Authorization to the aggrieved person to bring a civil action under Title VII or the ADA pursuant to section 706(f)(1) of Title VII or section 107 of the ADA within 90 days from receipt of such authorization.

29 C.F.R. § 1601.28 (West 1998). The EEOC offers no further definition of the meaning of "receipt," which is left ambiguous as to its scope. The EEOC's interpretation of the statute and regulations in its court of appeals amicus brief is not entitled to deference under *Chevron, U.S.A. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984) because that interpretation is clearly the agency's litigating position, in the nature of a "post hoc rationalization," rather than the result of the official exercise of rulemaking authority. *See Martin v Occupational Safety & Health Rev. Comm'n*, 499 U.S. 144, 156-57 (1991).

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6. The EEOC did not file an amicus brief in support of the Petitioner in this Court.

II. Where The Circuit Courts, Including the Fourth Circuit, Are In General Agreement That If The Date Of Receipt Of The EEOC Right-To-Sue Letter Is Not Known The Court Will Presume It Was Received Within Three Days After The Date Of The Letter, There Is No Issue Warranting This Court's Review

In order to create a split in the circuits, and to place the Fourth Circuit in the minority, Petitioner has miscast the court of appeals' holding in this case. Thus, Petitioner claims that the Fourth Circuit held that "even if the complainant can prove when she first received the right-to-sue letter, the Circuit will begin the 90-day right-to-sue period three days after the date the letter issued." (Pet. 13). On the contrary, in this constructive notice case, the court of appeals denominated its holding as follows: ". . . we hold that the limitations period began to run when the Notice of Right to Sue was delivered to Nguyen's home *and picked up by a designated neighbor*." (emphasis added) (Pet. App. 8a). Since the date the Thompsons picked up the EEOC's letter was not known, the court of appeals "presumed that service by regular mail is received within three days pursuant to Rule 6(e) of the Federal Rules." *Id.* at 7a. That presumption is shared by this Court and by all the courts of appeals in cases, like this one, where the actual receipt date by the complainant is not known. *See, e.g., Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 148 (1984); *Seitzinger v. Reading Hospital and Medical Center*, 165 F.3d 236, 239 (3d Cir. 1999); *Sherlock v. Montefiore Medical Center*, 84 F.3d 522, 525-26 (2nd Cir. 1996); *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 578 n.3 (D.C. Cir. 1998). Petitioner contends, however, that since she established that she actually first read the EEOC's right-to-sue letter on September 2, the statute of limitations began to

run on that date. (Pet. 18). But in all those cases where there was constructive receipt of the right-to-sue letter by complainant's family member or attorney (*see* pp. 9-10, *supra*) the courts of appeals did not begin the running of the statute from the later date when the complainant actually received the letter. The 90 days was computed from the date of the constructive receipt, if known, or, if not known, from a point three days after the date of the EEOC letter.

Were the Court to adopt Petitioner's approach, there could never be constructive receipt of a right-to-sue letter because a complainant could always testify as to when she actually first opened and read the letter, albeit after it was received by someone else. Under Petitioner's rule a complainant could take a six-month around-the-world trip, direct her neighbor to pick up her mail, and not have the statute of limitations run against her until she returned and actually read (or was handed) the EEOC's letter. Such a result is absurd.

Not surprisingly, Petitioner's cases (Pet. 15-21) are inapposite. None addresses the situation here where there was constructive receipt by someone other than complainant. Whatever might be the view of the respective circuits on the broader question whether delivery of the right-to-sue letter to the complainant's house or mailbox, or a post office notice that it is available for pick up, constitutes "receipt" for purposes of the statute of limitations, that is not this case. Petitioner's attempt to create a "straw man" issue should be rejected. There is no conflict in the circuits on the question in this case and no basis for review by this Court.

III. The Court Of Appeals Fact-Specific Analysis Of Whether Nguyen's Case Requires Equitable Tolling Does Not Warrant Review By This Court

In this case, the court of appeals and the district court considered and rejected Petitioner's equitable tolling argument. (Pet. App. 10a, 16a). Those determinations are well-supported in the record. The Court should reject Petitioner's invitation to re-examine the unique factual bases for the court's rejection of Petitioner's equitable tolling argument. *See United States v. Johnson*, 268 U.S. 220, 227 (1925).

The court of appeals found that it was Nguyen's own fault that she did not timely file her complaint and that there was no justification for equitable tolling. (Pet. App. 109). There is ample support for that determination. Thus, as early as September 9, Nguyen had the advice of legal counsel, and by September 26 Nguyen had obtained her EEOC file and had met with counsel. (Pet. App. 4a). While counsel told her at that meeting that she should get evidence to corroborate her position, nothing prevented her from filing her complaint after September 26, even without that corroborating evidence. As the court of appeals observed, on September 26 Nguyen still had 56 days to file her case, and her failure to do so was her own fault. (Pet. App. 109).

Nguyen contends that, unlike other circuits, the Fourth Circuit in this case ignored that she received erroneous advice from an EEOC case worker and supervisor about the filing deadline. (Pet. 26). The problem with Petitioner's argument is that it is based on premises unsupported in the record — that she consulted the EEOC employees before the November 21 filing deadline and that she informed the EEOC employees

that she had designated her neighbor to collect her mail and hold it safe. Nguyen's affidavit does not specify the date she contacted the EEOC. For all we know, it could have been after the November 21 due date or even after December 1, the date she claimed her complaint was due. If so, she could not have acted on the EEOC's advice to her detriment. Moreover, her affidavit does not state that she told the EEOC case worker or supervisor that she had designated her neighbors to pick up and hold her mail. Thus, it is possible the EEOC employees' response was based on incomplete facts or even on a completely hypothetical situation posed by Nguyen.

The EEOC's response, as reported by Nguyen, was not wrong. At most, it was ambiguous. The EEOC allegedly told her that her lawsuit must be filed "90 days after I received it [the right-to-sue notice]" If "received" encompasses constructive receipt by a designated agent, then the EEOC's response was correct. Thus, there is no probative evidence that Nguyen was misled by the EEOC or anyone else.[7] *See Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 150-152 (1984) (Complainant's "diligent efforts" not enough to invoke equitable tolling where no showing that motion for appointment of counsel was pending or of affirmative misconduct by the defendant that lulled the plaintiff into inaction). The court of appeals rightly concluded that her equitable tolling claim did not have merit.

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7. Even assuming that Nguyen was misled by the EEOC employees — and there is absolutely no evidence that she was — we submit that she had no right to rely on that informal advice, which was not based on any published regulation. *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680, 703 n.13 (1989). *See Robinson v. Dalton*, 107 F.3d 1018, 1023-24 (3d Cir. 1997) (single telephone call to EEOC counselor insufficient for equitable tolling where complainant failed to confirm telephonic advice by written communication).

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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